

82-1998

No.

Office - Supreme Court, U.S.

FILED

JUN 7 1983

ALEXANDER L. STEVAS,
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1982

JAMES G. WATT, SECRETARY OF THE INTERIOR, ET AL.

v.

THE COMMUNITY FOR CREATIVE NON-VIOLENCE, ET AL.

**PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT**

REX E. LEE

Solicitor General

J. PAUL MCGRATH

Assistant Attorney General

PAUL M. BATOR

Deputy Solicitor General

ALAN I. HOROWITZ

Assistant to the Solicitor General

LEONARD SCHAITMAN

KATHERINE S. GRUENHECK

Attorneys

Department of Justice

Washington, D.C. 20530

(202) 633-2217

QUESTION PRESENTED

Whether the National Park Service violated the First Amendment by enforcing 36 C.F.R. 50.27(a), which restricts camping in the national parks, to prevent respondents from sleeping in Lafayette Park and on the Mall in connection with a demonstration of the plight of the homeless.

PARTIES TO THE PROCEEDING

Manus J. Fish, Regional Director of the National Capital Region of the National Park Service, was named as a defendant in the complaint and is a petitioner here. Mitch Snyder, Mary Ellen Hombs, Harold Moss, Clarence West, Monroe Kylandezes, Fred Randall, and Mike Scott were plaintiffs in the district court and are respondents here.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Constitutional and regulatory provisions involved ..	1
Statement	3
Reasons for granting the petition	9
Conclusion	16
Appendix A	1a
Appendix B	88a
Appendix C	90a
Appendix D	91a

TABLE OF AUTHORITIES

<i>A Quaker Action Group v. Morton</i> , 516 F.2d 717	5, 9
<i>Adderley v. Florida</i> , 385 U.S. 39	15
<i>Community for Creative Non-Violence v. Watt</i> , 670 F.2d 1213	5
<i>Grayned v. City of Rockford</i> , 408 U.S. 104 ...	12
<i>Heffron v. International Society for Krishna Consciousness, Inc.</i> , 452 U.S. 640	12, 14, 15
<i>Hicks v. Miranda</i> , 422 U.S. 332	11
<i>Morton v. Quaker Action Group</i> , 402 U.S. 926 ..	11
<i>Perry Education Ass'n v. Perry Local Educator's Ass'n</i> , No. 81-896 (Feb. 23, 1983)	15
<i>Spence v. Washington</i> , 418 U.S. 405	6, 12, 13
<i>Tinker v. Des Moines School District</i> , 393 U.S. 503	12
<i>United States v. Abney</i> , 534 F.2d 984	5, 9, 12
<i>United States v. Grace</i> , No. 81-1863 (Apr. 20, 1983)	15
<i>United States v. O'Brien</i> , 391 U.S. 367 ..	6, 7, 8, 12, 13
<i>Vietnam Veterans Against the War v. Morton</i> , 506 F.2d 53	11
<i>Women Strike for Peace v. Morton</i> , 472 F.2d 1273	5, 9, 12

IV

Constitution, statutes and regulations:		Page
U. S. Const., Amend. I	1, 5, 7, 8, 9, 10,	
	11, 12, 13, 14, 15	
16 U.S.C. 1		4
16 U.S.C. (Supp. V) 1a-1		4
16 U.S.C. 3		4
36 C.F.R.:		
Section 50.19		4
Section 50.19(e)(8)	2, 4, 5, 9	
Section 50.27(a)	2, 4, 5	
Miscellaneous:		
47 Fed. Reg. (1982):		
pp. 24299-24306		4
p. 24302		13

In the Supreme Court of the United States

OCTOBER TERM, 1982

No.

JAMES G. WATT, SECRETARY OF THE INTERIOR, ET AL.

v.

THE COMMUNITY FOR CREATIVE NON-VIOLENCE, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Solicitor General, on behalf of James G. Watt, Secretary of the Interior, and Manus J. Fish, Regional Director of the National Capital Region of the National Park Service, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-87a) is reported at 703 F.2d 586. The opinion and order of the district court (App. D, *infra*, 90a-112a) are not yet reported.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, 88a-89a) was entered on March 9, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND REGULATORY PROVISIONS INVOLVED

The First Amendment provides in pertinent part:

Congress shall make no law * * * abridging the freedom of speech, or of the press, or the right of the peo-

ple peaceably to assemble, and to petition the Government for a redress of grievances.

36 C.F.R. 50.27(a) provides:

Camping is defined as the use of park land for living accommodation purposes such as sleeping activities, or making preparations to sleep (including the laying down of bedding for the purpose of sleeping), or storing personal belongings, or making any fire, or using any tents or shelter or other structure or vehicle for sleeping or doing any digging or earth breaking or carrying on cooking activities. The above-listed activities constitute camping when it reasonably appears, in light of all the circumstances, that the participants, in conducting these activities, are in fact using the area as a living accommodation regardless of the intent of the participants or the nature of any other activities in which they may also be engaging. Camping is permitted only in areas designated by the Superintendent who may establish limitations of time allowed for camping in any public camping ground. Upon the posting of such limitations in the campground no person shall camp for a period longer than that specified for the particular campground.

36 C.F.R. 50.19 (e)(8) provides:

In connection with permitted demonstrations or special events, temporary structures, [*sic*] may be erected for the purpose of symbolizing a message or meeting logistical needs such as first aid facilities, lost children areas or the provision of shelter for electrical and other sensitive equipment or displays. Temporary structures may not be used outside designated camping areas for living accommodation activities such as sleeping, or making preparations to sleep (including the laying down of bedding for the purpose of sleeping), or storing personal belongings, or making any fire, or doing any digging or earth breaking or carrying on cooking activities. The above-listed activities constitute camping when it reasonably appears, in light of all the circumstances, that the participants, in conducting these activities, are in fact using the area as a living accommodation regardless of the intent of the participants or the nature of any other activities in which they may also be engaging. Temporary struc-

tures are permitted to the extent described above, provided prior notice has been given to the Director, except that:

(i) No structures shall be permitted on the White House sidewalk.

(ii) All such temporary structures shall be erected in such a manner so as not to unreasonably harm park resources and shall be removed as soon as practicable after the conclusion of the permitted demonstration or special event.

(iii) The Director may impose reasonable restrictions upon the temporary structures permitted, in the interest of protecting the park areas involved, traffic and public safety considerations, and other legitimate park value concerns.

(iv) Any structures utilized in a demonstration extending in duration beyond the time limitations specified in paragraphs (e)(4)(i) and (ii) of this section must upon 24 hours notice be capable of being removed and the site restored or the structure secured in such a fashion so as to not unreasonably interfere with use of the park area by other permittees authorized under this section.

(v) Individuals or groups of 25 persons or less demonstrating under the small group permit exemption of § 50.19(b)(1) shall not be permitted to erect temporary structures other than small lecterns or speakers platforms. This provision is not intended to restrict the use of portable signs or banners.

STATEMENT

1. Since 1893, the Interior Department, through the National Park Service, has been charged with responsibility for management and maintenance of all national parks. These include the National Memorial-core area parks in Washington, D.C., including Lafayette Park and the Mall, which traditionally attract numerous visitors, as well as some demonstrators. In particular, the National Park Service is required to

promote and regulate the use of the * * * national parks * * * by such means and measures as conform to the fundamental purpose of said parks * * *, which purpose is to conserve the scenery and the natural and

historic objects and the wild life therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations.

16 U.S.C. 1. The Secretary of the Interior is authorized to promulgate rules and regulations for the use and management of these parks in accordance with the purposes for which they were established. 16 U.S.C. 3; 16 U.S.C. (Supp. V) 1a-1.

Pursuant to this authority, the Secretary of the Interior has adopted a variety of rules and regulations governing the use of the national parks, including the Memorial-core area parks. In particular, the Secretary has adopted a regulation prohibiting camping in the national parks outside of designated camping areas. No such camping areas have been designated in the Memorial-core area. "Camping" is defined as the "use of park land for living accommodation purposes such as sleeping activities, or making preparations to sleep (including the laying down of bedding for the purpose of sleeping), or storing personal belongings, or making any fire, or using any tents or * * * other structure * * * for sleeping or doing any digging or earth breaking or carrying on cooking activities." 36 C.F.R. 50.27(a). The regulation further provides that "[t]he above listed activities constitute camping when it reasonably appears, in light of all the circumstances, that the participants, in conducting these activities, are in fact using the area as a living accommodation regardless of the intent of the participants or the nature of any other activities in which they may also be engaging." *Ibid.*

Demonstrations for the expression of views or grievances may be held in the Memorial-core area pursuant to 36 C.F.R. 50.19. With minor exceptions, such demonstrations may be held only in accordance with an official permit issued by the National Park Service. *Ibid.* The regulations recognize that temporary structures may be erected in connection with permitted demonstrations but provide that such structures may not be used for camping. 36 C.F.R. 50.19(e)(8).¹

¹ These regulations were revised effective June 4, 1982. See 47 Fed. Reg. 24299-24306 (1982). The revisions were prompted by the decision

2. In 1982, respondent Community for Creative Non-Violence ("CCNV") applied for a permit from the National Park Service to conduct a demonstration in Lafayette Park and on the Mall beginning on December 21, 1982, and continuing through the last day of winter, for the stated purpose of demonstrating the plight of the homeless.² In particular, CCNV requested permission to erect symbolic tents, lay down bedding, and sleep as part of its demonstration.³ The National Park Service granted the permit on a seven-day, renewable basis but denied CCNV permission to lay down bedding or sleep in the symbolic tents, citing the camping prohibition in the pertinent regulations, 36 C.F.R. 50.19(e)(8) and 50.27(a). (The granting of the permit allowing CCNV to maintain a 24-hour presence at the park and to erect temporary structures (including "symbolic campsites") in connection with its demonstration was based on National Park Service regulations that attempted to comply with prior cases concerning demonstrations in the Memorial-core park area decided by the District of Columbia Circuit.⁴)

in *Community for Creative Non-Violence v. Watt* ("CCNV I"), 670 F.2d 1213 (D.C. Cir. 1982), which held that sleeping in tents by demonstrators in connection with First Amendment activities did not constitute "camping" prohibited under then-existing regulations.

² CCNV had held a similar demonstration on a smaller scale the previous winter after the court of appeals held in *CCNV I* that the National Park Service's "no camping" regulations did not extend to the activities in which CCNV sought to engage because they were related to First Amendment activities.

³ CCNV explained in its application materials that permitting persons "to sleep in relative warmth" as part of the demonstration or "the incentive of * * * a hot meal" was necessary to attract participants. See App. A, *infra*, 45a n.10, 69a; App. D, *infra*, 93a.

⁴ Based on a settlement of prior litigation and D.C. Circuit precedent, the National Park Service's regulations permit the erection of temporary structures in connection with a demonstration, including symbolic campsites. See *Women Strike for Peace v. Morton*, 472 F.2d 1273 (D.C. Cir. 1972). By the same token, the National Park Service permitted a 24-hour presence at the demonstration in line with D.C. Circuit precedent recognizing the First Amendment interest in a round-the-clock vigil. *United States v. Abney*, 534 F.2d 984 (D.C. Cir. 1976). See also *A Quaker Action Group v. Morton*, 516 F.2d 717, 734 (D.C. Cir. 1975) (striking down existing limitation on length of demonstrations).

On September 7, 1982, CCNV and the other named plaintiffs, who are described as either individual members of CCNV or homeless individuals, brought this suit in the United States District Court for the District of Columbia, challenging the constitutionality of the relevant regulations. CCNV sought a preliminary injunction against application of these regulations, arguing that they were vague, overbroad, unequally enforced, and violative of the respondents' First Amendment rights. Both parties filed motions for summary judgment.

The district court denied the request for an injunction and granted summary judgment for the government, holding that the regulations were valid both on their face and as applied (App. D, *infra*, 91a-112a). The court first concluded that the act of sleeping in this context was not "sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth amendments." *Id.* at 102a, quoting *Spence v. Washington*, 418 U.S. 405, 409 (1974). The court further held that under the standards set forth in *United States v. O'Brien*, 391 U.S. 367 (1968), any incidental restriction on First Amendment rights created by the regulations was justified (App. D, *infra*, 104a-106a). The court also rejected respondents' contention that the regulations had not been fairly and uniformly enforced (*id.* at 106a-108a).

3. Respondents appealed, and a panel of the court of appeals heard argument. Before the panel decided the case, however, the court *sua sponte* directed that it be heard *en banc*. In a one sentence *per curiam* decision, the *en banc* court, by a 6-5 vote, reversed the district court and enjoined the government "from prohibiting sleeping by demonstrators in tents in sites authorized for [respondents'] demonstration" (App. A, *infra*, 2a).⁵ This disposition was supported by a plurality opinion, joined in whole or in part by five judges, and by three concurring opinions. The splintered majority agreed that the National Park Service's "no

⁵ On March 17, 1983, the Chief Justice ordered the mandate of the court of appeals recalled and stayed its reissuance pending further order of the Court. On March 21, 1983, the full Court continued that order in effect pending the timely filing and disposition of a petition for a writ of certiorari (No. A-771).

camping" regulations were valid on their face. It was also agreed that, in the circumstances of this case, to apply them to bar sleeping as part of CCNV's demonstration would violate the First Amendment. There was, however, no consensus as to why the regulations as applied were violative of respondents' First Amendment rights.

The plurality opinion, by Judge Mikva, found that, in the context of this particular demonstration, sleeping in symbolic tents would be a communicative act and hence protected by the First Amendment. Judge Mikva explained that sleep is expressive in the context of any demonstration seeking to use sleep to help convey its message, and he specifically rejected the argument that sleeping in the context of CCNV's demonstration was "uniquely deserving" of First Amendment protection because it directly embodied the protesters' message that homeless people have no place to sleep (App. A, *infra*, 17a-18a). Purporting to apply the analysis set forth by this Court in *United States v. O'Brien*, *supra*, Judge Mikva found that the government's interest in enforcing the regulations against respondents did not justify the attendant burden on First Amendment rights (App. A, *infra*, at 19a-28a). Focusing the inquiry on demonstrators "similarly situated" to CCNV, Judge Mikva explained that there would be no "incremental savings of park resources" to be gained by proscribing sleep (*id.* at 22a-23a). Stating that the National Park Service was entitled to distinguish, in applying its regulation, between "sleeping that is expressive as part of a twenty-four hour vigil * * * [and] sleeping that is a mere convenience to daytime demonstrators" (*id.* at 25a), Judge Mikva concluded that the government's interests would not be sufficiently furthered "by keeping *these* putative protestors" from sleeping (*id.* at 28a; emphasis added).

Chief Judge Robinson and Judge Wright concurred with the caveat that they "intimate[d] no view as to whether sleeping would implicate the First Amendment were it not to add its own communicative value to the demonstration" (App. A, *infra*, 31a). Judge Edwards filed a concurring opinion, disagreeing with portions of Judge Mikva's opinion, but reaching the same result (*id.* at 32a-40a). Judge Edwards stated that, on the facts of this particular case, sleeping was "symbolic speech" covered by the First

Amendment (*id.* at 33a-34a). He concluded that under *O'Brien* the regulations could not constitutionally be applied to bar CCNV's demonstration because there are "reasonable * * * regulatory alternatives less restrictive of ~~or~~ ^{than} * * * a total ban against sleeping [that] still would accommodate the significant governmental interests at stake" (*id.* at 39a). Judge Ginsburg concurred only in the judgment (*id.* at 41a-48a). She characterized respondents' sleeping as "speech plus" (*id.* at 46a) that was not necessarily entitled to the same protection as traditional speech, but was sufficient "to require a genuine effort to balance the demonstrators' interest against other [government] concerns" (*id.* at 47a). Because she found it irrational to allow "tenting, lying down, and maintaining a twenty-four hour presence" while forbidding sleeping, Judge Ginsburg concluded that the line drawn in the regulations was not sufficiently "sensible, coherent, and sensitive to the speech interest involved" (*id.* at 48a).

Judge Wilkey, joined by four judges, dissented (App. A, *infra*, 49a-77a). Although expressing considerable doubt on the issue (*id.* at 56a-60a), Judge Wilkey assumed that respondents' sleeping activity would constitute a form of speech protected by the First Amendment and that the *O'Brien* analysis was therefore applicable (*id.* at 60a). Examining the general government interest in preventing camping in the Memorial-core area (see *id.* at 63a-66a), Judge Wilkey concluded that the regulation served a substantial interest in conserving park resources and preserving the right of non-campers to enjoy the parks; he found that this interest outweighed occasional incidental infringement on the activities of demonstrators (*id.* at 66a-71a). Judge Wilkey further stated that there was no constitutionally permissible less restrictive alternative to the total ban on camping (*id.* at 72a-77a) because "any intermediate position designed to accommodate 'First Amendment camping' would run afoul of the proscriptions against discretionary screening" (*id.* at 73a). Judge Scalia, joined by two judges, filed a separate dissenting opinion (*id.* at 78a-87a) denying that "sleeping is or can ever be speech for First Amendment purposes" (*id.* at 78a). Because the regulations proscribe the activities in question for reasons having nothing to do with their communicative character, Judge Scalia con-

cluded that they did not implicate First Amendment concerns.

REASONS FOR GRANTING THE PETITION

1. The decision below is the culmination of a series of decisions by the District of Columbia Circuit severely limiting, in the name of the First Amendment rights of demonstrators, the ability of the National Park Service to administer the Memorial-core area parks for the benefit of the general public. See *United States v. Abney*, 534 F.2d 984 (1976); *A Quaker Action Group v. Morton*, 516 F.2d 717 (1975); *Women Strike for Peace v. Morton*, 472 F.2d 1273 (1972). These decisions, which have increasingly diverged from established principles of First Amendment law, have steadily eroded the power of the National Park Service reasonably to regulate the conduct of demonstrators in these areas. The use of these parks by demonstrators, of course, is a legitimate use recognized and approved by the government (see 36 C.F.R. 50.19), but it must be subject to reasonable manner restrictions. As a result of these decisions, the use of these parks—constituting a unique national resource—as a forum for protesters has been elevated above the primary uses contemplated by Congress, making it more and more difficult to preserve them as places where the public can enjoy nature with some serenity. The decision below leaves the National Park Service in a position where it cannot effectively prevent camping in these historic urban parks and casts serious doubt on its ability to regulate other conduct there that may be asserted to be connected with First Amendment activity. Judge Mikva's candid observation (App. A, *infra*, 29a) that "[e]ach distinction and each line" drawn by the National Park Service in regulating sleeping in the park will be subjected to "close scrutiny" by the court simply underscores the need for this Court to step in and correct the D.C. Circuit's misguided course in this area of the law.

The practical impact of the decision below on the National Park Service's administration of the Memorial-core area parks is far-reaching. Apart from requiring that it issue a permit to CCNV's requested demonstration, the fragmented decision gives the National Park Service no guidance on how to deal with other applications to camp in the parks.

The three opinions of Judges Wright and Robinson, Edwards, and Ginsburg suggest that there may be cases where the National Park Service may ban camping in the parks even if it is asserted to express a message, but they do not suggest any standards to be applied in distinguishing among such permit applications and in identifying those cases in which the First Amendment rights associated with sleep outweigh the government's interest in preventing the use of Lafayette Park and the Mall for camping.⁶ On the other hand, the opinions of Judge Mikva (App. A, *infra*, 18a) and Judge Wilkey (*id.* at 71a-77a) suggest that any attempt to draw such distinctions necessarily would be content-based and hence violative of the First Amendment.

Thus, the National Park Service is left with two equally unpalatable alternatives in passing on future applications. It can safely comply with the decision below by allowing anyone to camp in the restricted park areas as long as it is alleged that the camping or sleeping activity is part of a demonstration. The cumulative impact of granting all these applications, however, clearly will adversely affect the general public's opportunity to use these parks and severely overtax park facilities.⁷ On the other hand, if the National Park Service attempts to distinguish among these applications, denials almost certainly will be the subject of litigation and apparently will be viewed by a majority of the judges on the court of appeals as impermissibly content-based. In short, the divergent viewpoints and conclusions of the 11 judges of the court of appeals have left the National Park Service in a position where it cannot administer its regulations in any way that is either manageable or likely to pass constitutional muster. Both the practical difficulties engendered by the decision below and the important issues raised warrant review by this Court.

2.a. The decision below is erroneous. First, it brushes aside an earlier decision of this Court, rendered in connec-

⁶ Moreover, as Judge Wilkey explains (App. A, *infra*, 74a-77a), it would not be difficult for any group wishing to camp on the Mall to advance a facially valid First Amendment justification for their proposed activity. See also opinion of Mikva, J., *id.* at 16a n.16.

⁷ For example, there is only one sanitation facility in Lafayette Park.

tion with a previous attempt by demonstrators to establish that camping on the Mall is protected by the First Amendment. *Morton v. Quaker Action Group*, 402 U.S. 926 (1971). In 1971 the district court issued an injunction prohibiting the Vietnam Veterans Against the War from, *inter alia*, camping on the Mall. The district court defined the term "overnight camping" as "sleeping activities, or making preparations to sleep (including the laying down of bedrolls or other bedding) * * *," which corresponds to the language in the current regulation.⁸ The court of appeals modified that order to permit the demonstrators to use their symbolic campsite 24 hours a day "as an incident to or as part of their public demonstrations and gatherings, and for the purpose of sleeping in their own equipment, such as sleeping bags, on that portion of the Mall." *A Quaker Action Group v. Morton*, No. 71-1276 (D.C. Cir. Apr. 19, 1971). The following day the Chief Justice vacated the court of appeals' order and reinstated the prohibitory order of the district court. The full Court then upheld the Chief Justice, vacated the court of appeals' order permitting sleeping, and reinstated "with full force and effect" the injunction of the district court. *Morton v. Quaker Action Group*, *supra*.

In this case the plurality brusquely dismissed this Court's order in *Quaker Action* as inapposite (App. A, *infra*, 10a n.5) and in fact relied on the vacated court of appeals opinion (*id.* at 11a). It did so notwithstanding the fact that in *Quaker Action* this Court upheld an injunction based on a line much like the line drawn in the existing regulations that the court of appeals here held invalid. That ruling, albeit rendered in a summary action (cf. *Hicks v. Miranda*, 422 U.S. 332, 344 (1975)), should have been deemed authoritative in this case.

b. The decision below is contrary to well settled principles of First Amendment jurisprudence. It is black letter law that the First Amendment does not accord each citizen a right to determine the most effective way of presenting

⁸ A detailed summary of this litigation is set forth in *Vietnam Veterans Against the War v. Morton*, 506 F.2d 53, 56 n.9 (D.C. Cir. 1974).

his views; rather, the exercise of First Amendment rights is subject to "reasonable time, place, and manner restrictions." *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 647 (1981). See also, e.g., *Grayned v. City of Rockford*, 408 U.S. 104, 115 (1972). In particular, the Court has rejected the notion that "an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." *United States v. O'Brien*, 391 U.S. 367, 376 (1968). See also *Tinker v. Des Moines School District*, 393 U.S. 503, 515 (1969) (White, J., concurring).

The court below paid lip service to these principles, but in fact appears to have abandoned them. Judge Mikva's opinion holds that respondents' intent that their "presence" be expressive, coupled with the fact that their demonstration would take place "at the seat of our national government," converts sleeping into expressive conduct protected by the First Amendment (App. A, *infra*, 17a). This conclusion follows in the footsteps of earlier circuit precedent that woodenly accorded First Amendment protection to any conduct intended to be communicative. Judge Wright's opinion in *Women Strike for Peace v. Morton*, *supra*, suggested that no distinction could be drawn between speech and conduct (472 F.2d at 1282) and that the erection of any structure designed to communicate views was entitled to First Amendment protection (*id.* at 1287-1288). In *United States v. Abney*, *supra*, the court assumed that a protester's desire to conduct a round-the-clock vigil was sufficient to make sleeping an expressive activity protected by the First Amendment.

These rulings are not supported by the "symbolic speech" decisions of this Court. Although this Court has used First Amendment analysis in cases involving expressive conduct, those cases all involved conduct that had little, if any, purpose other than expression; and they involved activity far closer to traditional "speech" than the act of sleeping. In addition, those cases involved government regulations more directly aimed at expression. See, e.g., *Spence v. Washington*, 418 U.S. 405, 410, 414 n.8 (1974); *Tinker v. Des Moines School District*, *supra*. Extending these cases

to cover respondents' sleeping in the park simply contradicts the Court's oft-repeated admonition that not all conduct intended to be expressive is "speech." See *Spence v. Washington*, *supra*, 418 U.S. at 409.

c. Even assuming that respondents' camping is fully protected by the First Amendment, the court of appeals erred in holding that the governmental interest underlying the regulation did not outweigh the incidental infringement of First Amendment rights. In *United States v. O'Brien*, *supra*, the Court concluded that it did not violate the First Amendment to prosecute a demonstrator for burning his draft card as a protest against the Vietnam War. The Court explained that "when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the non-speech element can justify incidental limitations on First Amendment freedoms." 391 U.S. at 376. Applying a four-part test, the Court concluded that the government's interest in banning draft card burning was sufficient to justify the ban's restriction of First Amendment freedoms.⁹ The government's interest in banning camping in the Memorial-core area parks is substantial and fully sufficient under *O'Brien* to justify incidental restrictions on demonstrators who purport to camp as a way of conveying a message. The "no camping" regulations are a valid exercise of the Secretary's authority to manage park resources. The Memorial-core area parks are not designed to handle overnight campers, and permitting camping would overtax sanitary facilities and law enforcement personnel. Moreover, camping would seriously interfere with the enjoyment of the parks by numerous other users. See generally 47 Fed. Reg. 24302 (1982).

⁹ The test set forth in *O'Brien* states (391 U.S. at 377):

[A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

The plurality attempted to minimize these concerns by stating that the only government interest involved is that in prohibiting sleeping “by all those who wish to engage in sleeping as part of their demonstration and have been granted renewable permits to demonstrate on a twenty-four hour basis on sites at which they have also been allowed to erect temporary symbolic structures” (App. A, *infra*, 22a). As Judge Wilkey explains, however (*id.* at 63a-66a), this approach is unsound. Virtually any regulation can be made to seem unnecessary if the inquiry is focused on the government interest in not making an exception in the particular case at hand, rather than on the general regulation. See *Heffron v. International Society for Krishna Consciousness, Inc.*, *supra*, 452 U.S. at 652.¹⁰

On the other hand, the “no camping” regulations represent a minimal infringement of speech. Respondents may effectively communicate their message to the public at precisely the same locations, by means other than actually sleeping. Although they claim that the effectiveness of their demonstration might be enhanced if they are permitted to sleep—either because sleeping in Lafayette Park particularly expresses “the poignancy of their plight” (App. A, *infra*, 17a) or because the establishment of a place to sleep with hot meals would attract many persons to the demonstration (see note 3, *supra*)—it is well settled that the Constitution does not create an absolute right to deliver

¹⁰ The plurality also focuses narrowly on the interest in preventing sleeping by demonstrators who are already permitted to remain in symbolic tents overnight (App. A, *infra*, 22a-23a). It is important, however, to remember that the National Park Service allowed respondents to engage in these activities because of its perception of the First Amendment requirements of applicable circuit precedent, even though the government does not agree that the First Amendment actually requires it to permit such activities. See note 4, *supra*. The thrust of the regulation is to prohibit the use of the parks for living accommodation purposes. That goal serves an important government interest, and, as Judge Wilkey explains (App. A, *infra*, 66a-68a, 74a-75a), it is well served by the definition of camping in the regulations. To ignore this broader context and focus only on the government interest in preventing a particular 24-hour demonstrator from sleeping is to “nickel and dime [the] regulation to death” (see *id.* at 65a).

a message in the precise manner thought by the demonstrator to be maximally effective. See, e.g., *Heffron v. International Society for Krishna Consciousness, Inc.*, *supra*, 452 U.S. at 647; *Adderley v. Florida*, 385 U.S. 39, 47-48 (1966).

The "no camping" regulations operate essentially as a restriction on the *manner* in which respondents may conduct their demonstration. Such a restriction is valid if it is "content-neutral, * * * narrowly tailored to serve a significant government interest, and leave[s] open ample alternative channels of communication." *United States v. Grace*, No. 81-1863 (Apr. 20, 1983), slip op. 5; *Perry Education Ass'n v. Perry Local Educators' Ass'n*, No. 81-896 (Feb. 23, 1983), slip op. 7-8. There can be little doubt that the regulations involved here meet this standard. They are narrowly focused on preserving the parks from the damage and overloading of resources that use of them for living accommodations would engender, while still allowing demonstrators ample opportunity to communicate their messages. Indeed, as Judge Wilkey explains (App. A, *infra*, 71a-77a), a total ban on camping is a necessity if the government is to further its undeniable interest in generally preventing the use of the Memorial-core area parks as campgrounds.

In sum, the decision below, by recognizing as "speech" protected by the First Amendment any conduct intended to be expressive and by artificially confining the government's interest in regulation to one particular set of facts, has emasculated the National Park Service's ability to manage the Memorial-core area parks. The National Park Service will be hard-pressed to enforce its regulations at all without running the risk of making impermissible content-based distinctions. As a result, if the decision below is permitted to stand, a significant aspect of the administration of these parks effectively will be taken out of the National Park Service's hands, and the right of the general public to peaceful enjoyment of the parks—the primary purpose for which Congress established them—will be subordinated to demonstrators who claim that conduct inconsistent with the parks' primary purpose is nevertheless privileged because claimed by them to be "expressive."

CONCLUSION

The petition for a writ of certiorari should be granted.
Respectfully submitted.

REX E. LEE
Solicitor General

J. PAUL MCGRATH
Assistant Attorney General

PAUL M. BATOR
Deputy Solicitor General

ALAN I. HOROWITZ
Assistant to the Solicitor General

LEONARD SCHAITMAN
KATHERINE S. GRUENHECK
Attorneys

JUNE 1983

APPENDIX A

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 82-2445

THE COMMUNITY FOR CREATIVE NON-VIOLENCE, *et al.*,
APPELLANTS

v.

JAMES G. WATT, SECRETARY OF THE INTERIOR, *et al.*

No. 82-2477

THE COMMUNITY FOR CREATIVE NON-VIOLENCE, *et al.*,
APPELLANTS

v.

JAMES G. WATT, SECRETARY OF THE INTERIOR, *et al.*

Appeals from the United States District Court
for the District of Columbia

(D.C. Civil Action No. 82-02501)

ON REHEARING EN BANC

Argued January 14, 1983

Decided March 9, 1983

Before ROBINSON, *Chief Judge*, WRIGHT, TAMM, MAC-KINNON, WILKEY, WALD, MIKVA, EDWARDS, GINSBURG, BORK and SCALIA, *Circuit Judges*.

PER CURIAM: Circuit Judge Mikva files an opinion, in which Circuit Judge Wald concurs, in support of a judgment reversing. Chief Judge Robinson and Circuit Judge Wright file a statement joining in the judgment and concurring in Circuit Judge Mikva's opinion with a caveat. Circuit Judge Edwards files an opinion joining in the judgment and concurring partially in Circuit Judge Mikva's opinion. Circuit Judge Ginsburg files an opinion joining in the judgment. Circuit Judge Wilkey files a dissenting opinion, in which Circuit Judges Tamm, MacKinnon, Bork and Scalia concur. Circuit Judge Scalia files a dissenting opinion, in which Circuit Judges MacKinnon and Bork concur. The judgment appealed from is reversed, and the case is remanded to the District Court with instructions to enjoin appellees from prohibiting sleeping by demonstrators in tents on sites authorized for appellants' demonstration.

MIKVA, *Circuit Judge*: The Community for Creative Non-Violence (CCNV) applied for and was granted a renewable seven-day permit to conduct a round-the-clock demonstration, commencing on the first day of winter, on the Mall and in Lafayette Park in Washington, D.C. The declared purpose of the demonstration was to impress upon the Reagan Administration, the Congress, and the public the plight of the poor and the homeless. The National Park Service (Park Service) granted CCNV a permit to set up two symbolic campsites, one on the Mall with a maximum of one hundred participants and forty tents, and one in Lafayette Park with approximately fifty participants and twenty tents.

Although the permit allowed the demonstration participants to maintain a twenty-four hour presence at their symbolic campsites, the Park Service denied the participants a permit to sleep. According to the government, such conduct would violate the Park Service's recently revised anti-camping regulations, *see* 36 C.F.R. §§ 50.19, 50.27 (1982). CCNV claims that this prohibition strikes at the core message the demonstrators wish to convey—that homeless people have no permanent place to sleep. Accordingly, CCNV and seven individuals who wish to participate in the demonstration seek a court order invalidating the permit's limitation on sleeping as an unconstitutional restriction on their freedom of expression. Following cross-motions for summary judgment, the district court decided in favor of the Park Service and the case arose on expedited appeal. After briefing and oral argument before a motions panel, but before that panel issued a decision, the case was heard en banc.

Because we conclude that the government has failed to show how the prohibition of sleep, in the context of round-the-clock demonstrations for which permits have already been granted, furthers any of its legitimate interests, we reverse the district court's decision and grant CCNV's request for injunctive relief.

I. BACKGROUND

A. *The Regulatory Framework*

This case presents the second occasion in which the government has sought to apply anti-camping regulations to demonstrations proposed by this appellant. In 1981, the Park Service allowed CCNV to erect nine tents in Lafayette Park to symbolize the desperation of homeless persons, but denied the demonstrators permission to dramatize this concern by actually sleeping in the tents. Under the regulations then in effect, 36 C.F.R. § 50.19(e) (8) (1981) (use of temporary structures); *id.* § 50.27(a) (camping), the Park Service reasoned that overnight sleeping would carry the demonstration beyond the permissible "use of symbolic campsites reasonably related to First Amendment activit[y]" and into the impermissible realm of "camping primarily for living accommodation," see 46 Fed. Reg. 55,961 (1981). CCNV appealed that ruling.

In *Community for Creative Non-Violence v. Watt* (CCNV I), 670 F.2d 1213 (D.C. Cir. 1982), this court held that the Park Service had misapplied those regulations to CCNV's proposed activity. Because the regulations precluded only camping "primarily for living accommodation," and the act of sleeping in CCNV's demonstration was not to be done for that purpose, the court found that such conduct fell outside of the Park Service's proscription:

[T]here is no evidence in the Record suggesting that the handful of tents in Lafayette Park is intended "primarily for living accommodation." The appellees will not prepare or serve food there; they will not build fires or break ground; they will not establish sanitary or medical facilities. Indeed the uncontroverted evidence in the case is that the purpose of the symbolic campsite in Lafayette Park is "primarily" to express the protestors' message and not to serve as a temporary solution to the problems of

homeless persons. Thus the only activity at issue here—sleeping in already erected symbolic tents—cannot be considered “camping”

Id. at 1217. As a result of the court’s decision, CCNV staged its demonstration, including sleeping, for approximately seven weeks last winter.

The Park Service has since revised its camping regulations for the National Capital Region through a formal rulemaking. 47 Fed. Reg. 24,299-306 (1982) (codified at 36 C.F.R. §§ 50.19, 50.27 (1982)). The new regulations, set out in the margin,¹ specifically include within

¹ As revised, section 50.27(a) prohibits camping in park areas not designated as public camping grounds, and defines the term as follows:

Camping is defined as the use of park land for living accommodation purposes such as sleeping activities, or making preparations to sleep (including the laying down of bedding for the purpose of sleeping), or storing personal belongings, or making any fire, or using any tents or shelter or other structure or vehicle for sleeping or doing any digging or earth breaking or carrying on cooking activities. The above listed activities constitute camping when it reasonably appears, in light of all the circumstances, that the participants, in conducting these activities, are in fact using the area as a living accommodation regardless of the intent of the participants or the nature of any other activities in which they may also be engaging.

36 C.F.R. § 50.27(a) (1982). Section 50.19(e)(8), as amended, prohibits the use of temporary structures for camping outside of designated camping areas. It reads as follows:

In connection with permitted demonstrations or special events, temporary structures may be erected for the purpose of symbolizing a message or meeting logistical needs such as first aid facilities, lost children areas or the provision of shelter for electrical and other sensitive equipment and displays. Temporary structures may not be used outside designated camping areas for living accommodation activities such as sleeping, or making preparations to sleep (including the laying down of

the definition of prohibited camping the act of sleeping "when it reasonably appears, in light of all the circumstances, that the participants, in conducting these activities, are in fact using the area as a living accommodation regardless of the intent of the participants or the nature of any other activities in which they may also be engaging." 47 Fed. Reg. at 24,302. Although the amended regulation admittedly permits some leeway for administrative discretion, the Park Service has determined that the regulation prohibits the sleeping that would be done at CCNV's demonstration this winter.

To understand fully the government's current policy on sleeping in the capital's parks, it is important to note that sleeping is not, *per se*, illegal. Visitors to the capital, or workers on their lunch breaks, may safely catnap for short periods of time without running afoul of the law. Sleeping, in these circumstances, conjures up no threats to peace and public order. Although the Park Service's anti-loitering regulation prohibits sleeping with intent to remain for more than four hours, it contains an exception for those with the proper authorization of the Superintendent of the National Capital Parks. See 36 C.F.R. § 50.25(k) (1982). And, as mentioned, the government's camping regulation also allows for "sleeping activities" that are not deemed to constitute use of the area for living accommodation. An example of the discretion inherent in this latter determination is evidenced by the Park Service's authorization, for participants in a Viet-

bedding for the purpose of sleeping), or storing personal belongings, or making any fire, or doing any digging or earth breaking or carrying on cooking activities. The above-listed activities constitute camping when it reasonably appears, in light of all the circumstances, that the participants, in conducting these activities, are in fact using the area as a living accommodation regardless of the intent of the participants or the nature of any other activities in which they may also be engaging.

Id. § 50.19(e) (8).

nam veterans' demonstration on the Mall in May 1982,² of all-night sleep at a mock Vietnam War-era "firebase" where some of the demonstrators were periodically roused to stand symbolic "guard duty."³ See Park Service Permit to Vietnam Veterans Against the War dated April 20, 1982 and accompanying letter, *reprinted in* Record Document (RD) 5. The only apparent distinction between the sleeping in the veterans' demonstration and the sleeping proposed by CCNV is that the veterans slept on the ground, without any shelter. According to the Park Service's interpretation of the new regulations, one's participation in a demonstration as a sleeper becomes impermissible "camping" when it is done within any temporary structure erected as part of the demonstration.

The Park Service nonetheless allows the erection of temporary structures, including tents, in connection with permitted demonstrations under 36 C.F.R. § 50.19(e) (8) (1982).⁴ Originally worded to allow any "temporary

² Although the veterans' application to demonstrate was filed prior to the effective date of the amended regulations, the Park Service applied the new regulations. See Letter from Park Service to Vietnam Veterans Against the War dated April 22, 1982, *reprinted in* Record Document (RD) 5.

³ Despite conflicting evidence in the record as to whether some of the veterans slept all night, it is clear that the Park Service authorized at least some participants in the demonstration to "be asleep in the area at all times during the night." *Id.*

⁴ Section 50.19(e) (8) was promulgated in response to the decision of this court in *Women Strike for Peace v. Morton*, 472 F.2d 1273 (D.C. Cir. 1972) (per curiam). See 47 Fed. Reg. 24,304 (1982). In that case, the court held that Women Strike for Peace, an anti-war organization, could erect a temporary display on the Ellipse. Although the per curiam opinion was followed by three separate statements, the reasoning of the judges was clear: "the Park Service is required to allow the erection of structures by demonstrators to the same extent that it participates in or sponsors the erection of structures itself." *Id.* at 24,300. The assumption

structures . . . reasonably necessary for the conduct of the demonstration," 41 Fed. Reg. 12,879, 12,883 (1976), this regulation was amended in 1982 to state specifically that temporary structures "may be erected for the purpose of symbolizing a message," 47 Fed. Reg. at 24,305. Since that amendment, the Park Service has, on at least two occasions besides this one, granted permits to groups of demonstrators to erect symbolic tents. *See* Park Service Permit to ACORN dated June 18, 1982, *reprinted in* RD 5 (50 tents dramatizing housing crisis); Park Service Permit to Palestine Congress of North America dated September 8, 1982, *reprinted in* RD 5 (107 tents symbolizing Palestinian refugee camp). Tents were also allowed prior to the amendment to symbolize conditions in Vietnam, the plight of American Indians, and the plight of the homeless. 47 Fed. Reg. at 24,301.

B. *The Case Law*

The dispute in this case over the Park Service's camping regulations bears similarities to numerous other disputes that this court has heard within the last fifteen years, each concerning the proper use of public park lands within the nation's capital. *E.g.*, *CCNV I*, 670 F.2d 1213 (D.C. Cir. 1982) (sleeping in Lafayette Park); *United States v. Abney*, 534 F.2d 984 (D.C. Cir. 1976) (sleeping in Lafayette Park); *Vietnam Veterans Against the War v. Morton (VVAW)*, 506 F.2d 53 (D.C. Cir. 1974) (camping on Mall); *A Quaker Action Group v. Morton (Quaker Action)*, No. 71-1276 (D.C. Cir. Apr. 19, 1971), *vacated mem.*, 402 U.S. 926 (1971) (camping on

that lies behind this proposition is also clear: "[a structure] is a vehicle for expression of views . . . and [to the extent that it acts as such is] entitled to a degree of First Amendment protection." 472 F.2d at 1288 (Wright, J., concurring); *see also id.* at 1295 (Leventhal, J., concurring) ("Structures on park land, even though temporary, are within the reach of freedom of communications . . ."). With our opinion today, we reaffirm the result reached in that decision.

Mall); *see also O'Hair v. Andrus*, 613 F.2d 931 (D.C. Cir. 1979) (papal mass on Mall); *A Quaker Action Group v. Morton*, 516 F.2d 717 (D.C. Cir. 1975) (public gathering in Lafayette Park); *Women Strike for Peace v. Morton*, 472 F.2d 1273 (D.C. Cir. 1972) (display on Ellipse); *Jeanette Rankin Brigade v. Chief of Capitol Police*, 421 F.2d 1090 (D.C. Cir. 1969) (assembly on Capitol grounds). It should not be surprising, therefore, to learn that from this considerable history of decisionmaking the court has on several occasions addressed the propriety *vel non* of sleeping, in connection with public demonstrations, on the Mall and in Lafayette Park.

In 1971, in *Quaker Action*, No. 71-1276 (D.C. Cir. Apr. 19, 1971), this court modified a district court order limiting an anti-war demonstration on the Mall to the hours of 9:00 am to 4:30 pm. As a matter of summary reversal, the court lifted the district court's nighttime curfew and allowed the demonstrators to use a section of the Mall "as part of their public demonstrations . . . for the purpose of sleeping in their own equipment, such as sleeping bags" *Id.* at —, *cited in VVAW*, 506 F.2d at 56 n.9. The Supreme Court vacated our summary reversal in that case by a decree without opinion in *Morton v. Quaker Action Group*, 402 U.S. 926 (1971), an action which a motions panel of this court recognized as controlling in a dispute between the same litigants and involving similar sleeping on the Mall three years later. *See VVAW*, 506 F.2d at 56. Despite the very specific nature of its holding, the *VVAW* panel expressed its view that camping overnight is an activity "whose unfettered exercise is not crucial to the survival of democracy and . . . thus beyond the pale of First Amendment protection." *Id.* at 57-58. In *United States v. Abney*, 534 F.2d 984 (D.C. Cir. 1976), this court characterized the gratuitous statements in *VVAW* as non-binding dicta.⁵

⁵ *See also CCNV I*, 670 F.2d at 1217 n.26 (confirming this distinction). The motions panel in *VVAW* was correct in

and held that, in the unusual circumstances of an individual protestor's round-the-clock vigil in Lafayette Park, unavoidable sleeping "must be taken to be sufficiently expressive in nature to implicate First Amendment scrutiny in the first instance." *Id.* at 985. The *Abney* court then held the Park Service's anti-loitering regulation unconstitutional as applied, but stated in dicta that, "[i]t may well be that [a non-discretionary] across-the-board ban on sleeping outside official campgrounds would be constitutionally acceptable if duly promulgated and even-handedly enforced." *Id.* at 986.

The question left open by *Abney* was not squarely before us last term in *CCNV I*; the Park Service's anti-camping regulation was construed to avoid the constitutional issue. As part of the court's decision, however, it was necessary to categorize the sleeping activities of the protestors as falling within one of two administrative classifications: (1) the use of symbolic campsites reasonably related to first amendment activities or (2) camping primarily for living accommodations. The *CCNV I* court concluded:

holding that the action taken by the district court "directly contravened the controlling precedent." *VVAW*, 506 F.2d at 55 n.6. We refuse, however, to read the precedent as broadly as that panel. The Supreme Court's decision on which that panel grounded its argument, *Morton v. Quaker Action Group*, 402 U.S. 926 (1971), was issued without an opinion. Absent any supporting reasoning, it should not, and indeed cannot, be cited as precedent for the proposition that sleep can never be protected by the first amendment. The Supreme Court has held consistently that summary disposition extends "only to 'the precise issues presented and necessarily decided by those actions.'" *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 499 (1981) (quoting *Mandel v. Bradley*, 432 U.S. 173, 176 (1977) (per curiam)). As Chief Judge Bazelon observed in his statement concurring in the denial of rehearing *en banc* in the *VVAW* case itself, it is very difficult to ascertain what issues the Supreme Court determined in its 1971 decision. *VVAW*, 506 F.2d at 61.

We have no doubt as to which category encompasses the activities in question here. First, the appellees are engaged in a political protest and a petition for redress of grievances. As part of their protest, the appellees desire permission to sleep in their tents in Lafayette Park. This appears to be no more than "the use of [a] symbolic campsite[]." Moreover, as the District Court found, in this case sleeping itself may express the message that these persons are homeless and so have nowhere else to go.

670 F.2d at 1216-17 (footnote omitted) (emphasis in original). When the *CCNV I* decision is added to the decisions of this court in *Abney* and *Quaker Action*, it is quite clear that on several occasions this court has acknowledged that sleep can be "expressive," or part of a political protest, for the purposes of either administrative or constitutional classifications.

II. DISCUSSION

The district court's decision in this case necessarily followed from its conclusions that: (1) CCNV's demonstration falls within the scope of the amended anti-camping regulations; (2) sleeping, within the context of CCNV's demonstration, falls outside the scope of the first amendment; and (3) even assuming first amendment scrutiny is required, the new anti-camping regulations are constitutional as applied to CCNV's proposed sleeping activities. Although we agree that CCNV's proposed activities fall within the government's amended regulations, we cannot uphold the constitutionality of the regulations as applied to CCNV.

A. *The Scope of the New Regulations*

CCNV contends that it does not fall under the amended anti-camping regulations because it seeks to use sleep as a form of expression and not for "living accommodation" purposes. We cannot accept this argument. The regulation's exclusion of "the intent of the participants or the nature of any other activities in which they may also be

engaging," 36 C.F.R. §§ 50.19(e) (8), 50.27(a) (1982), underscores the evident purpose of the regulations to cover "living accommodations" that may also be expressive of the demonstrators' message. Indeed, in the prefatory statement accompanying the 1982 amendments, the Park Service indicated that it was "amending § 50.19(e) (8) to forbid specifically the use of any such structures, including tents, for the purpose of conducting *any* living accommodation activity," which was defined to include "sleeping." 47 Fed. Reg. at 24,304 (emphasis added). As we stated in *CCNV I*, the court may rely upon an agency's contemporaneously issued policy statement as an accurate representation of the agency's purpose. 670 F.2d at 1216 (citing *Environmental Defense Fund, Inc. v. EPA*, 636 F.2d 1267, 1280 (D.C. Cir. 1980)). It thus seems clear to us that these demonstrators come under the new regulations.⁶

⁶ Because CCNV's proposed conduct is clearly proscribed by the regulations, CCNV may not claim that those regulations are constitutionally void for vagueness. See, e.g., *Parker v. Levy*, 417 U.S. 733, 756 (1974) ("One to whose conduct a statute clearly applies may not successfully challenge it for vagueness.").

We also do not find the regulations to be overbroad because the amount of constitutionally protected activity covered by the regulations (assuming *arguendo* that such activity exists in this case) cannot reasonably be calculated as "substantial." As the Supreme Court stated in *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973), "[w]here conduct and not merely speech is involved, we believe that the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." The government's ban against sleeping in tents applies to all park areas administered by National Capital Parks in the District of Columbia, Maryland, and Virginia. 36 C.F.R. § 50.1 (1982). Because camping in these areas is primarily for recreation, the chances of the ban directly conflicting with sleeping as an arguable form of expression must be estimated as small. There is certainly no evidence before us today to suggest that any such conflict can be characterized as "substantial."

B. *The Scope of the First Amendment*

The scope of the first amendment's protection of free expression is not as amenable to precise definition as the Park Service's prohibition of "camping." The Supreme Court has afforded first amendment scrutiny to government regulation of such expressive activities as demonstrating,⁷ marching,⁸ leafletting,⁹ picketing,¹⁰ wear arm-bands,¹¹ and affixing a peace symbol to an American flag.¹² Although we acknowledge that all conduct need not be labelled "speech" merely because the doer "intends thereby to express an idea," *United States v. O'Brien*, 391 U.S. 367, 376 (1968), we also recognize that expressive conduct cannot be written out of the Constitution merely because the government may wish to label it "camping." The values implicit in the first amendment are too multifaceted to be subject to wooden categorizations.¹³

⁷ See, e.g., *Edwards v. South Carolina*, 372 U.S. 229 (1963).

⁸ See, e.g., *Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969).

⁹ See, e.g., *Schneider v. Town of Irvington*, 308 U.S. 147 (1939).

¹⁰ See, e.g., *Thornhill v. Alabama*, 310 U.S. 88 (1940).

¹¹ See, e.g., *Tinker v. Des Moines School District*, 393 U.S. 503 (1969).

¹² See, e.g., *Spence v. Washington*, 418 U.S. 405 (1974).

¹³ It is far too late in the day to pretend that the Supreme Court has sanctioned an unwavering first amendment line between speech and conduct. Such a view cannot be squared with either the holdings of those cases extending first amendment protection to a wide range of physical activities, see *supra* cases cited in notes 7-12, or with the Court's occasional statements on the matter. E.g., *Brown v. Louisiana*, 383 U.S. 131, 141-42 (1966) (plurality), cited in *Tinker v. Des Moines School District*, 393 U.S. 503, 505 (1969) ("[First amendment] rights are not confined to verbal expression. They embrace appropriate types of action which certainly include the right in a peaceable and orderly manner to protest by silent and reproachful presence"); see also *Ely*,

In the present case, our evaluation of the government's ban on sleeping in symbolic structures is underscored by first amendment scrutiny because, as applied to CCNV's proposed demonstration, the government's ban will clearly affect expression: there can be no doubt that the sleeping proposed by CCNV is carefully designed to, and in fact will, express the demonstrators' message that homeless persons have nowhere else to go. The "test" used by the Supreme Court to determine whether conduct is "sufficiently imbued with elements of communication to fall within the scope of the First . . . Amendment[]," *Spence v. Washington*, 418 U.S. 405, 409 (1974) (per curiam), is to examine the intent of the would-be communicator and the context in which his or her conduct

Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis, 88 HARV. L. REV. 1482, 1495 (1975) ("The O'Brien Court thus quite wisely dropped the 'speech-conduct' distinction as quickly as it had picked it up").

The theoretical objections to a speech-conduct distinction have been noted by several commentators. See, e.g., Baker, *Scope of the First Amendment Freedom of Speech*, 25 U.C.L.A. L. REV. 964, 1010 (1978) ("If the distinction is between 'expressing' and 'doing,' most conduct falls into both categories."); Ely, *supra*, at 1495 ("Attempts to determine which element 'predominates' will . . . inevitably degenerate into question-begging judgments about whether the activity should be protected."); Henkin, *The Supreme Court, 1967 Term—Foreword: On Drawing Lines*, 82 HARV. L. REV. 63, 79 (1968) ("Even singular, idiosyncratic forms of expression can prove no less articulate, as when Simeon spent his days sitting on a pillar in the desert or the King of Denmark wore a six-pointed star."); Note, *Symbolic Conduct*, 68 COLUM. L. REV. 1091, 1108 (1968) ("Recent work in communications theory underlines the connection between free choice of the medium of communication and freedom of expression."). Even Professor Emerson, a leading proponent of the speech-action distinction, acknowledges that "the clearest manifestation of expression involve[s] some action, as in the case of holding a meeting, publishing a newspaper, or merely talking." T. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 80 (1970).

takes place. In *Spence*, for example, the Court held that displaying the American flag with an attached peace symbol in the context of demonstrations against the bombings of Cambodia and the Kent State killings:

was not an act of mindless nihilism. Rather, it was a pointed expression of anguish by appellant about the then-current domestic and foreign affairs of his government. *An intent to convey a particularized message was present, and in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it.*

Id. at 410-11 (emphasis added). This court has already held that, within the context of an individual's round-the-clock vigil, sleeping could be taken as "sufficiently expressive in nature to implicate First Amendment scrutiny in the first instance." *Abney*, 534 F.2d at 985. In the present case, within the context of a large demonstration with tents, placards,¹⁴ and verbal explanations,¹⁵ the communicative context is sufficiently clear that the participant's sleeping cannot be arbitrarily ruled out of the arena of expressive conduct.¹⁶

¹⁴ See Photographs of 1981-82 CCNV demonstration dated February 22, 1982, reprinted in RD 17; Declaration of Gabriel Leanza, ¶ 7, reprinted in RD 19.

¹⁵ See Second Declaration of Mitch Snyder, ¶ 5, reprinted in RD 15; Declaration of Gabriel Leanza, ¶ 8, reprinted in RD 19.

¹⁶ Although CCNV clearly evidences in its permit application an intent to express a message through the protestors' sleeping, it also documents a very functional view of sleeping: that sleeping opportunities are vital to its demonstration in order to make it possible for the homeless to attend. See CCNV application to demonstrate filed September 7, 1982, reprinted in RD 1, at 2. The government contended at oral argument that CCNV had thus belied any true intent to communicate a message through the participants' sleeping. But we do not find the government's argument to be so conclusive. To the extent that we are assessing CCNV's intent, and not its skill in drafting documents, we cannot close our eyes to the fact that CCNV's application indicates that sleeping will

Indeed, we cannot understand how the government can deny the indicia of political expression that permeate CCNV's pointed use of the simple act of sleeping. The protestors choose to sleep, purposely across from the White House and Capitol grounds, in sparsely appointed tents which the Park Service has already designated as undeniably "symbolic." Their permit application states that this conduct is intended to send the same message as this court recognized was sent in CCNV's 1981-82 demonstration: that the problems of the homeless will not simply disappear into the night.¹⁷ Unlike the thousands of homeless men and women whose nights are spent on grates, in doorways, or in back alleys, these demonstrators propose to sleep within the conspicuous context of two organized demonstration sites that create a backdrop—by the combined use of structures, explanatory

serve both an expressive and functional purpose. Moreover, we note that CCNV need not prove the intent of its demonstrators by any sort of preponderance of evidence. As we indicate in note 31 *infra*, demonstrators should be held to no higher standard than the advancement of a plausible contention that their conduct is intended to, and in the context of their demonstration likely will, express a message. In this case, such a plausible contention is supplied by CCNV's intent to model this year's demonstration after last year's. Despite what must surely have been the same sociological realities of the homeless last year, the *CCNV I* court found that sleeping in the tents in the winter of 1981-82 sent an unmistakable message. 670 F.2d at 1217.

¹⁷ Although the *CCNV I* court did not decide the constitutional issue, it is unclear how last year's sleeping could have been sufficiently expressive for the purpose of satisfying the Park Service's old policy criterion ("use of symbolic campsites reasonably related to First Amendment activities," 46 Fed. Reg. 55,959, 55,961 (1981)), but remain insufficiently expressive to fall within the first amendment this year. As CCNV indicates in its 1982 application, the demonstration planned for this year is modeled after last year's demonstration. See CCNV application to demonstrate filed September 7, 1982, reprinted in RD 1, at 2.

signs, and verbal discourse—to ensure that the message sought to be sent by the demonstrators' conduct will, in all likelihood, be received. True, CCNV has devised a means of expression that also serves to provide the protestors with the "luxury" of a blanket and a bit of ground-space, within a tent, with which to pass a winter's night. But for those genuinely homeless persons who choose to forsake temporarily their grates and doorways for these tents, the communicative dimension of the sleeping in this demonstration is not overshadowed by the simultaneous provision of a single amenity. The first amendment is not so rarefied that it cannot accommodate within its scope the conduct of these demonstrators who use their bodies to express the poignancy of their plight.

We add, moreover, that even were we not to focus on the peculiarly expressive nature of sleeping, first amendment scrutiny would still be implicated. This conclusion stems from the fact that the protestors' purpose, whether asleep or awake, is to maintain a "symbolic presence that makes more visible and concrete the results of [presidential and congressional] inaction" on the conditions of the homeless. See CCNV application to demonstrate filed September 7, 1982, *reprinted in* RD 1, at 2. In short, the demonstrators seek to create an inescapable night-and-day reminder to the nation's political leadership that homeless persons exist. Given this undeniable intent, and the contextual fact that the demonstration will take place at the seat of our national government, it is clear that CCNV's proposed "presence" is intended to be expressive regardless of whether the demonstrators sit down, lie down, or even sleep during the course of the demonstration. Thus, whatever the particular form of the protestors' presence at night, their presence itself implicates the first amendment. In this respect, CCNV's twenty-four hour presence is entitled to the same first amendment protection as a vigil. Although not as small, stylized, or silent as the "reproachful presence" in *Brown v. Louisiana*, 383 U.S. 131,

142 (1965) (silent civil rights vigil in a segregated public library), it is identical in both concept and purpose to such conduct. See *United States v. Abney*, 534 F.2d 984 (D.C. Cir. 1976) (sleeping as part of a vigil in Lafayette Square entitled to first amendment scrutiny in the first instance).

We wish to make clear, however, that by holding sleeping to be expressive conduct within the context of this particular demonstration, we reject two subsidiary arguments urged on us by CCNV. First, we reject CCNV's contention that sleeping in its demonstration is uniquely deserving of first amendment protection because it directly embodies the group's message that homeless people have no place else to sleep.¹⁸ Under CCNV's distinction, a group with a "no-place-to-sleep" message (such as the homelessness of refugees) could express it by deliberately sleeping, but a group with a different message (such as opposition to the nuclear arms race) could not sleep. Such a distinction is impermissible, however, because it would require the government to draw distinctions among groups desiring to express themselves through sleeping depending on the subject matter or content of their message and its alleged relationship to sleep, something the first amendment is designed to prevent. See, e.g., *Consolidated Edison Co. v. Public Service Commission*, 447 U.S. 530, 536 (1980); L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 12-2, at 580 (1978). Second, we also reject CCNV's argument that its sleeping must be protected because it is the most effective means by which the group can convey its message.¹⁹ The first amendment does not guarantee individuals access to the most effective channels of communication. See, e.g., *Adderley v. Florida*, 385 U.S. 39, 47-48 (1966). On the other hand,

¹⁸ Appellants' Reply to Opposition to Appellants' Emergency Motion for Injunction Pending Appeal and Opposition to Appellants' Motion for Summary Affirmance 20.

¹⁹ Appellants' Reply, *supra* note 18, at 12-13.

the fact that CCNV's manner of expression may turn out to be quite effective does not make it any the less "speech."²⁰

C. *The Regulation as Applied*

That CCNV's conduct comes within the scope of the first amendment, however, only begins our constitutional analysis. In *United States v. O'Brien*, 391 U.S. 367 (1968), the Supreme Court noted that "when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms." *Id.* at 376. The *O'Brien* Court then established that a governmental interest may be sufficiently justified

if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

Id. at 377. In short, *O'Brien* requires us to engage in a balancing of first amendment freedoms and their societal

²⁰ Indeed, as Professor Tribe indicates, there is an identifiable interest in according unorthodox modes of expression first amendment protection:

If only orthodox modes of expression were protected, "the old saw that familiarity breeds contempt," . . . might mean that truly *effective* communication would be left undefended by the first amendment. Moreover, . . . laws which leave unorthodox media defenseless in effect favor orthodox messages

L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 12-20, at 685 n.12, (quoting Ely, *supra* note 13, at 1489) (emphasis in original).

costs²¹ that is structured to place a thumb on the first amendment side of the scales.²²

In approaching this task, we are mindful that CCNV seeks a permit for the exercise of first amendment rights on public parkland whose use for communication is of special importance:

There is an unmistakable symbolic significance in demonstrating close to the White House or on the Capitol grounds which, while not easily quantifiable, is of undoubted importance in the constitutional balance. Although this theory has been used to justify demonstrations near state capitols as well, *see Edwards v. South Carolina*, 372 U.S. 229 (1963), it is in Washington—where a petition for redress of national grievances must literally be brought—that the theory has its primary application.

Women Strike for Peace v. Morton, 472 F.2d 1273, 1287 (D.C. Cir. 1972) (Wright, J., concurring). As the Supreme Court added in *Grayned v. City of Rockford*, 408 U.S. 104, 115 (1972), “[t]he right to use a public place for expressive activity may be restricted only for weighty reasons.”

The Park Service argues that its prohibition of CCNV’s sleeping in the symbolic tents is justified because such activity could: (1) deprive others of the use of nationally significant space; (2) cause significant damage to park resources; (3) create serious sanitation problems; (4) seriously tax law enforcement resources; and (5) increase

²¹ “The basic issue in all such cases is how much the First Amendment requires society to give up in the interest of communication—that is, what price we are willing to put on free speech.” *Women Strike for Peace v. Morton*, 472 F.2d 1273, 1284 (D.C. Cir. 1972) (Wright, J., concurring).

²² The metaphor of placing a judicial thumb on the first amendment side of the scales may be attributed to the genius of Professor Harry Kalven. *See Kalven, The Concept of the Public Forum: Cox v. Louisiana*, 1965 SUP. CT. REV. 1, 28.

requests for such activity in connection with other demonstrations that would, in turn, create pressure from non-demonstrating visitors for similar accommodations. 47 Fed. Reg. 24,302 (1982). These interests are identified by the Park Service in its brief in this case²³ and were also identified in its 1982 rulemaking to justify the flat prohibition of "camping." *Id.* "Camping," however, includes such non-sleeping activities as making fires, digging, earth breaking, and cooking. *Id.* at 24,305. Because CCNV neither seeks to do any of these activities, nor requests permission to establish medical or sanitation facilities,²⁴ to store personal belongings,²⁵ or even to serve food,²⁶ the government's interests must be weighed against only that activity which CCNV seeks to do: sleep within tents that they have been given permission to erect²⁷ and at which they have been allowed to maintain a twenty-four hour presence.

²³ Appellees' Response in Opposition to Appellants' Emergency Motion for Injunction Pending Appeal 8-9.

²⁴ See CCNV application to demonstrate filed September 7, 1982, *reprinted in* RD 1, at 2.

²⁵ See Letter from Mitch Snyder to Park Service dated March 5, 1982, *reprinted in* RD 19, at 1.

²⁶ See CCNV application to demonstrate filed September 7, 1982, *reprinted in* RD 1, at 2.

²⁷ CCNV has never maintained that it needs or desires to use cots in these symbolic campsites. See December 5th Declaration of Mitch Snyder, ¶ 5, *reprinted in* RD 21. We note that CCNV used bedding materials (blankets) last year and that it is quite likely that it will do so again. This use of bedding is one of the indicia the Park Service employs to determine if "camping" is taking place. See 36 C.F.R. §§ 50.19(e)(8), 50.27(a) (1982). We hold, however, that in the context of sleeping in tents, the government has no discernible reason to prohibit such bedding; bedding in a tent requires no additional ground space, is out of view, and has no connection to any of the other interests asserted by the government in this case—sanitation facilities, law enforcement personnel, or living accommodation subsidies.

This is not to say, however, that the government's interest in prohibiting expressive sleeping at symbolic campsites that is part of a demonstration must be weighed in a vacuum. In *Heffron v. International Society for Krishna Consciousness*, 452 U.S. 640 (1981), the Supreme Court held that the government's interest in prohibiting first amendment activity must be assessed not in terms of letting just one group pursue the activity but in terms of letting all similarly situated groups do so. *Id.* at 654. Transposed to the first amendment activity involved in this case, therefore, *Heffron* requires us to determine if the government's interests in park preservation, law enforcement, and the like (outlined above) are furthered by prohibiting expressive sleeping by all individuals or groups similarly situated to CCNV—that is, by all those who wish to engage in sleeping as part of their demonstration and have been granted renewable permits to demonstrate on a twenty-four hour basis on sites at which they have also been allowed to erect temporary symbolic structures. The dissent insists that we weigh the government's interests in prohibiting sleeping by all groups—whether for first amendment purposes or not—lest we “nickle and dime every regulation to death.” Dissenting Opinion at 17. The dissent's addition of makeweights to the government's side of the balance, however, shortchanges the first amendment's premium on precision. Here, the Park Service has already established a renewable permit procedure that limits the number of people who are allowed to demonstrate or to erect symbolic structures. The interests of people who do not possess a permit are simply not at issue in this case.

Having properly focused the inquiry, it is difficult to imagine how the application of the Park Service's regulations to groups similarly situated to CCNV will further any important interest. Because such groups are already allowed to erect tents and maintain an all-night presence during which time they may sit, stand, or even lie down

in the tents, there are no incremental savings of park resources, sanitation facilities, or law enforcement personnel to be gained by proscribing only sleep. Indeed, allowing an all-night presence by wakeful protestors would seem to tax sanitation facilities, law enforcement personnel, and the park resource itself to a greater extent than would allowing those same protestors simply to sleep.

Our review of the prefatory rationale to the revised regulations reveals at most only one attenuated governmental interest in precluding CCNV's demonstrators from sleeping:

Experience with administering the court's decision allowing sleeping has revealed that sleeping activity by demonstrators expands to include other aspects of living accommodations such as the storage of personal belongings and the performance of necessary functions which have converted the sleeping area into actual campsites.

47 Fed. Reg. at 24,301. But this justification must be found wanting under *O'Brien's* "no greater [restriction] than is essential" test; any interest in preventing other "camping" activity can be furthered by less restrictive means.²⁸ Here, the Park Service's renewable permit pro-

²⁸ It has been suggested by some that the Supreme Court in *Heffron v. International Soc. for Krishna Consciousness*, 452 U.S. 640 (1981), signaled a departure from the less restrictive means test of *O'Brien*. See Note, 61 NEB. L. REV. 167, 182-86 (1982). Compare *Tacyne v. City of Philadelphia*, 687 F.2d 793, 797-98 (3d Cir. 1982) with *New York City Unemployed and Welfare Council v. Brezenoff*, 677 F.2d 232, 237 (2d Cir. 1982). We find, however, that the majority in *Heffron* did apply the test to the regulation of ISKCON's activities. See 452 U.S. at 654. The Court examined the alternatives put forward by ISKCON—penalizing disorder, limiting the number of people authorized to conduct the activity, restricting the activity to certain locations within the forum—and concluded that "it is quite improbable that the alternative means . . . would deal adequately with the problems posed . . ." *Id.* Such is not the case here; the alternative put forward in *Heffron* itself, for instance, would better

cedure provides a mechanism whereby permits can be revoked if illegal activities occur. See 36 C.F.R. § 50.19(f) (1982).²⁹

The government's interest in preserving parkland for the use of others is also not furthered by its ban on sleep. If anything, the nighttime enjoyment of Lafayette Park and the Mall by nondemonstrators would probably be enhanced if the 150 CCNV demonstrators were asleep. Because CCNV has already been granted a renewable seven-day, twenty-four hour permit to demonstrate at its two discrete sites, a ban on sleeping simply does not preserve those parts of the parks for the use of others. To the extent that other demonstrators wish to use the space temporarily allocated to CCNV, the Park Service's permit procedures already provide for nonrenewal of CCNV's weekly permit. See *id.* § 50.19(e) (5).

We are next urged to consider the government's interest in preventing "pressure" for similar living accommodations from nondemonstrating visitors to Washington, D.C. 47 Fed. Reg. at 24,302. As a practical matter, we seriously question whether there is a large market for living accommodations in sparse tents on the Mall, in the winter, without heating, cooking, medical, or sanitation facilities. Even assuming that such a market is theoretically pos-

serve the Park Service's interests than a total ban on sleep and would be less restrictive of the first amendment activity proposed. See *infra* notes 29 & 32.

²⁹ In addition, we note that the Park Service surely has the ability to police demonstrations against the expansion of activities such as cooking, making fires, etc. Indeed, many pages of the government's brief are taken up with illustrations of how it has enforced the sleeping ban against other groups since the new regulations came into effect. Appellees' Response, *supra* note 23, at 10-13. It would appear that the Park Service could simply shift its personnel from nighttime sleep patrols to policing against these other activities, thereby assuring the protection of parkland at little, if any, additional expense.

sible, we note that such an "undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression." *Tinker v. Des Moines School District*, 393 U.S. 503, 508 (1969).³⁰ As a constitutional matter, moreover, the Park Service is free to apply its anti-camping regulations to such nondemonstrators who, by definition, have no first amendment interests to "balance" against the regulation. We add that any governmental interest in not treating certain groups—even those exercising first amendment rights—differently from others would appear to be marginally insignificant. Demonstrators are already accorded privileges not permitted nondemonstrators, such as the right to stay in the park all night despite the anti-loitering regulation, 36 C.F.R. § 50.25(k) (1982), and the right to erect temporary structures, *id.* § 50.19(e) (8). The additional privilege of sleeping at the demonstration site as part of the demonstration would seem of minimal consequence to the distinctions on treatment already drawn.

Finally, the government suggests that requests for convenient camping by persons pursuing speech activities would increase. If by this the government means that additional camping requests will be made by those who merely wish to sleep in parks near the sites of daytime demonstrations, such requests may be denied. It would seem an entirely permissible distinction to permit sleeping that is expressive as part of a twenty-four hour vigil, but not to permit sleeping that is a mere convenience to daytime demonstrators. See *Quaker Action Group v. Morton*, 402 U.S. 926 (1971); *VVAW*, 506 F.2d 53 (D.C.

³⁰ Such a fear would be truly undifferentiated because any increase in requests for living accommodations by nondemonstrators simply could be refused by the Park Service. Accordingly, this wholly insubstantial fear of "requests" is of far less significance than the real possibility in *Heffron* that a significant influx of people with a valid right of access to a state fair would flood the walkways of an already crowded fairgrounds with leafletters and solicitors. 452 U.S. at 652-53.

Cir. 1974).³¹ If, on the other hand, the government anticipates an increase in applications for symbolic campsites, with requests for permission to sleep during all night demonstrations, it may not deny all such requests merely because it expects a large number of people to apply.

Our holding does not mean, however, that the Park Service must grant every request, at any time, for any number of temporary structures or sleepers. Merely because we have held that expressive sleep may not be prohibited on the basis of the message conveyed does not mean that all forms of regulation are foreclosed to the government.³² Thus, the government may use valid,

³¹ We reiterate that the Park Service is not allowed to decide whether it sees a sufficient relationship between the message of the would-be demonstrators and their asserted expressive interest in sleeping. *See supra* text at 13. Instead, it need only determine whether the demonstrators seek to sleep for expressive purposes, as opposed to sleep for mere convenience or recreation. We note that the Park Service already makes this same determination in evaluating requests for temporary structures "for the purpose of symbolizing a message." 36 C.F.R. § 50.19(e) (8) (1982). Accordingly, we do not expect the Park Service to become enmeshed in any in-depth probe of the requesters' ulterior motives. Rather, we expect that all plausible requests will be accepted at face value and processed by the Park Service with the same degree of respect and efficiency that the Park Service has processed demonstrators' requests for temporary symbolic structures. And, we add, that any permits for symbolic sleeping which are abused by demonstrators may, as always, be rescinded.

³² The dissent inexplicably assumes that the only less restrictive means for furthering the government's interests in park management is to discriminate among applicants for "camping" permits on the basis of subject matter or content—something that neither we, nor the dissent, countenance as a legitimate governmental option. Whatever the dissent's purpose in knocking down this straw man, it nowhere else discusses the obvious alternative of revoking a demonstration's permit should its participants engage in non-sleep "camping" activities. *See supra* note 29. Indeed, unlike the situation in *Heffron* where the Court found that alternative

content-neutral, time, place, or manner regulations provided that such regulations are both reasonable and narrowly tailored to further the government's substantial interests. See *Police Department of Chicago v. Mosley*, 408 U.S. 92, 101 n.8 (1972); *Grayned*, 408 U.S. at 115. The government may, for example, limit the number of tents, the size of tents or campsites,³³ and the number of persons allowed to sleep.³⁴ It may continue its current practice of issuing permits on a renewable weekly basis, under which one group's permit will not be renewed if another group requests the space, and under which the permit may be revoked if the demonstrators engage in such prohibited activities as cooking or making fires. It may set aside

means for crowd control could not deal adequately with the potentially large numbers of state fair solicitors, 452 U.S. at 654, both the government and the dissent have underscored the potential effectiveness of permit revocation as a means of enforcing the Park Service's anti-camping regulations in Lafayette Park and on the Mall:

Furthermore, in the one case where the Park Service detected a violation of the regulations, it demanded compliance and the next day, after similar violations occurred, revoked the demonstration permit for non-compliance with the regulations and conditions of the permit. A standard of reasonable, even-handed enforcement calls for no more.

Dissenting Opinion at 9; see also Appellees' Response, *supra* note 23, at 10-13.

³³ See *Women Strike for Peace*, 472 F.2d at 1290 ("It would be permissible, for example, . . . to regulate the size or aesthetic character of displays built on park land.") (Wright, J., concurring).

³⁴ We note that both CCNV and the government indicated some flexibility at oral argument as to the overall number of demonstrators. While we do not hold that CCNV, or any group, has a right to as many round-the-clock protestors as it likes, we also require that the Park Service, in setting any limitations, do so with an eye to the first amendment values which we have identified in this opinion.

certain times when no demonstrations are allowed in order to accommodate other particularly heavy uses of the parks. See 36 C.F.R. § 50.19(d)(1), (e)(8) (1982). And possibly, it may be able to set aside some of the more serene areas of the Memorial Core area as "sanctuaries" at which round-the-clock demonstrations are never compatible.³⁵

In sum, the Park Service has failed to demonstrate that the government's interests will be furthered by keeping these putative protestors from the sleeping activity which is the sole point in dispute. We reverse, therefore, because the indiscriminate line the government seeks to draw against sleeping cannot pass first amendment muster. Accordingly, we grant CCNV the injunctive relief it seeks, enjoining the Park Service from prohibiting sleep at CCNV's demonstration.

CONCLUSION

The Mall and Lafayette Park are special places in the stockpile of American fora. They are at the very heart of the nation's capital where ideas are to be expressed and grievances are to be redressed. Thus, the focus of this case is the symbolic locus of the first amendment. This explains the series of understandable difficulties that the

³⁵ In *Washington Free Community, Inc. v. Wilson*, 334 F. Supp. 77 (D.D.C. 1971), the court held that the governmental interest in protecting the serenity of such places as the Lincoln and Jefferson Memorials may be greater than its interest in promoting the serenity of such busy places as Dupont Circle, Farragut Square, or Lafayette Park. *Id.* at 82. Without expressing any views on the precise calculus of interests as to any one area, we note that the Memorial Core area in Washington, D.C. is comprised of discrete, and often quite different, parts. Although we think that the public's interest in expressing its views are particularly strong on the Mall and in Lafayette Park, see *supra* text at 14, the Park Service need not treat the Memorial Core area as a monolithic whole.

Park Service has had in trying to fashion rules that meet the multifarious demands put upon these unique public lands. It also rationalizes the number of times that this court has visited the problems of the Mall, Lafayette Park, and the first amendment.

But the uniqueness does not justify an abandonment of either first amendment principles or legitimate government interests in managing these public places. Considering these two imperatives, we reach several conclusions.

First, the Park Service regulations are facially valid and can be employed in the management of the Mall and Lafayette Park.

Second, the application of these regulations to specific fact situations implicating the first amendment must be measured against the government's interest in limiting certain activities and the means it employs to further those interests. It is in this respect that the Park Service cannot be upheld in its decision that tenting is all right, lying down is all right, maintaining a twenty-four hour presence is all right, but sleeping is impermissible.

Finally, the Park Service cannot mechanically apply its regulations to requests from groups seeking to exercise first amendment rights through sleeping. Although the government can and must retain a "content-neutral" obliviousness to the kind of message which a particular group seeks to express through sleeping, the Park Service cannot be oblivious to the implications of the first amendment—or the attendant complications. Each distinction and each line the Park Service draws in such applications must bear close scrutiny to ensure that symmetry of management does not crowd out first amendment claims.

We doubt that this will be the last occasion that this court will have to undertake the difficult reconciliation of first amendment activities with the necessity for order

and management in the Mall and Lafayette Park. In a pluralistic society boasting of its free expression, we can expect no less.³⁶

It is so ordered.

³⁶ In his separate dissenting statement, Judge Scalia attempts to extract a simple rule from a complex web of cases. His efforts are confounded for at least two reasons. First, to determine if conduct is sufficiently expressive to implicate first amendment scrutiny, the Supreme Court has instructed us to look to the context in which the conduct takes place and the intent with which it is carried out. *Spence v. Washington*, 418 U.S. at 410-11. It is not possible to resolve the question merely by stating, as does Judge Scalia, that "[i]t is difficult to conceive of any activity inherently less expressive than the act (if it may be called that) of sleep." The same judgment could also be made about the act of sitting down in *Brown v. Louisiana*, 383 U.S. 131 (1966) (the library sit-in case), and only proves Professor Ely's warning that such intuitive conclusions "inevitably degenerate into question-begging judgments about whether the activity should be protected," see Ely, *supra* note 13, at 1495. Second, Judge Scalia collapses the four-pronged *O'Brien* test into a one-pronged standard. But in *O'Brien* the Supreme Court was analyzing a law that it found not to have been directed against the communicative nature of draft card burning and still felt it necessary to consider the extent to which substantial governmental interests were furthered and the possibility of using less restrictive means. The fact that the *Spence* Court invalidated the application of a statute which was directed against the communicative nature of flag displays, without reaching the *O'Brien* test, hardly suggests that *O'Brien* was, *sub silentio*, overturned. Judge Scalia's attempt to restrict *O'Brien* to "speech-plus" cases not only overlooks the wholly nonverbal conduct for which *O'Brien* was convicted but also the values underlying the first amendment. To suggest that individuals can be punished for expressive nonverbal conduct because they violate a "neutral" law—regardless of whether the application of that law to them is necessary to further an important governmental interest—puts a premium on spoken or written "speech" that has no bearing on the values of self-expression and contribution to the marketplace of ideas that give the first amendment meaning. Judge Scalia's preoccupation with these types of "speech" ignores the fact that the first amendment's values may be furthered by nonverbal, as well as verbal, expression.

ROBINSON, *Chief Judge*, and WRIGHT, *Circuit Judge*, concurring: We join in reversal, and in Judge Mikva's opinion with a caveat to one branch of its First Amendment analysis. As the opinion explains convincingly, sleeping in tents at the demonstration sites is a vivid and forceful component of the public message the demonstrators seek to convey; it summons First Amendment scrutiny because, *qua* sleeping, it is expressive. We intimate no view as to whether sleeping would implicate the First Amendment were it not to add its own communicative value to the demonstration.

EDWARDS, *Circuit Judge, concurring*: For the reasons set forth below, I would reverse the judgment of the District Court. In some significant respects, I concur in Judge Mikva's opinion. I write separately, however, because I view the case from a somewhat narrower perspective than does he.

I.

I find this case to be both difficult and confounding in several respects. First, it is not entirely clear to me why the appellants have pursued this litigation. While I am not prepared to say that this suit was ill-advised, I remain troubled by certain theoretical inconsistencies in the appellants' presentations to this court, the trial court, and in their application to the National Park Service. It would seem to me that when one pursues a claim involving important constitutional rights in areas affected by amorphous legal doctrine, the litigation should be founded on some clear, consistent, and tenable thesis. To insist upon a judicial resolution of this case, given the facts and record at hand, arguably suggests a lack of common sense.

This brings me to my second concern, namely, that this may be one of those "hard cases" that has a high potential to produce "bad law." The diverse range of judicial opinions alone certainly suggests that, at a minimum, this is a case that finds no easy or consensus solution in the courts. And it is not entirely clear to me what has been achieved by this rather exhausting expenditure of judicial resources. Nevertheless, as a judge, my responsibility is to *decide* cases that are properly before the court, however questionable I may view the pursuit of litigation. I therefore turn to that task.

II.

The opinions of Judges Wilkey and Mikva set forth fully the facts and history of this litigation, so I will not dwell on these details. In my view, the appellants' most potent challenge to the National Park Service's pro-

hibition against camping is that the revised regulations, as applied to bar one aspect of their demonstration, infringe upon their First Amendment rights. To address this challenge, it is necessary to determine whether sleeping under the circumstances of this case constitutes "speech" protected by the First Amendment. I believe that it does, and that the Park Service's total ban against sleeping cannot withstand scrutiny under the test set forth by the Supreme Court in *United States v. O'Brien*, 391 U.S. 367, 376-77 (1968).¹

The determination whether the challenged regulations infringe upon the appellants' First Amendment rights depends largely on one's characterization of their proposed activity. In some cases, sleeping in the park may be wholly facilitative. Here, it is undeniably true that the appellants' sleeping is in part facilitative; the appellants have stated, numerous times, that sleeping is necessary to attract demonstrators and capture media attention. But there is more to it than that, for "in this case sleeping itself may express the message that these persons are homeless and so have nowhere else to go." *Community for Creative Non-Violence v. Watt*, 670 F.2d 1213, 1216-17 (D.C. Cir. 1982). A nocturnal presence at Lafayette Park or on the Mall, while the rest of us are comfortably couched at home, is part of the message to be conveyed. These destitute men and women can express with their bodies the poignancy of their plight. They can physically demonstrate the neglect from which they suffer with an articulateness even Dickens could not match.

¹ Judge Wilkey correctly acknowledges that the alleged "camping" in this case "is limited to such activities as erecting tents or other structures, laying out blankets, sleeping bags, and other bedding materials, and sleeping." "[C]ooking, building fires, and digging latrines" are not called into question in this case because the appellants do not seek to engage in such activities. Indeed, the only matter in dispute is *sleeping*; the Park Service has not sought to bar the appellants from erecting tents, laying out blankets or bedding, or even from maintaining a 24-hour presence.

The Supreme Court has not bound the First Amendment to any simplistic speech/conduct distinction. It has extended heightened scrutiny to governmental regulation of a wide variety of expressive activities, including leaf-letting, marching, wearing armbands, burning draftcards, and dancing. The sleeping proposed by the appellants is, in the circumstances of this case, every bit as expressive as those activities. In *Spence v. Washington*, 418 U.S. 405 (1974) (per curiam), the Supreme Court afforded First Amendment protection to a peace symbol attached to an American flag in the context of demonstrations against the bombings in Cambodia and the Kent State killings. "An intent to convey a particularized message was present, and in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it." *Id.* at 410-11. Similarly, in this case there is both a "particularized message" appellants wish to convey by sleeping in the park and a reasonable expectation that the message will be understood by those who view it.

Thus, sleeping in this case is symbolic speech within the pale of the First Amendment. Accordingly, the regulations at issue here, which have been applied as a total ban against the appellants' sleeping in the park, must satisfy the *O'Brien* test in order to pass constitutional muster.

III.

In Part III.A. of his opinion, Judge Wilkey assumes (correctly, I believe), that the sleeping proposed by the appellants is properly considered "speech" that is protected by the First Amendment. To the extent that he equivocates on this point, I disagree with the suggested analysis.

As I have already suggested, *Spence v. Washington* establishes the applicable framework for determining whether activity is "speech" protected by the First Amendment. *Spence*, which was decided six years after *O'Brien*, also clearly answers the question intimated in

O'Brien regarding the "variety of conduct [that] can be labeled 'speech.'" *United States v. O'Brien*, 391 U.S. at 376. The *Spence* test ensures that the "variety of [such] conduct" is not "limitless." *Id.* Thus, if Judge Wilkey means to rely on a passing statement by the *O'Brien* Court to suggest that we should draw artificial lines between "speech" and "conduct" to discern protected activity, I would reject this as a flawed analysis. As has been aptly noted:

A constitutional distinction between speech and nonspeech has no content. A constitutional distinction between speech and conduct is specious. . . . There is nothing intrinsically sacred about wagging the tongue or wielding a pen; there is nothing intrinsically more sacred about words than other symbols. Other kinds of communication are also effective—. . . saluting a flag, kneeling in worship, holding a beloved hand. Even singular, idiosyncratic forms of expression can prove no less articulate, as when . . . the King of Denmark wore a six-pointed star.

The Constitution protects freedom of "speech," which commonly connotes words orally communicated. But it would be surprising if those who poured tea into the sea and who refused to buy stamps did not recognize that ideas are communicated, disagreements expressed, protests made other than by word of mouth or pen.

Henkin, *The Supreme Court, 1967 Term—Foreword: On Drawing Lines*, 82 HARV. L. REV. 63, 79 (1968) (footnote omitted).

I also find specious the argument that in order to judge expressive activity of the sort here in question the government might be forced to draw distinctions among groups depending on the content of their message. Any such "content evaluation" by the government clearly is prohibited under the First Amendment. But, as the

Spence Court obviously recognized in adopting a contextual approach, it is one thing for government officials to determine whether a message is intended (and may reasonably be understood as such) and quite another for them to judge the substantiality or value of a given message. The former determination, condoned by *Spence*, does not involve any prohibited content evaluation.

IV.

Beyond his Part III.A., however, I agree with the analytical framework and mode of analysis adopted by Judge Wilkey to determine whether the activity proposed by the appellants is constitutionally protected. Excluding Part III.A., my principal disagreement with Judge Wilkey concerns the application of the "less restrictive alternative" test, a matter to which I will turn shortly. There are two other points of analysis at which we may part company; both deserve brief mention.

At one point in his opinion, Judge Wilkey suggests that "[t]he convenience of the demonstrators and the media value of their message will rival in importance the First Amendment aspects of the camping and thereby *further diminish the claim that their First Amendment interest is substantial* relative to the government's interest in preventing camping generally" (emphasis added). I reject this conclusion primarily because I can find no suggestion in the case law that a court must weigh the facilitative versus the expressive aspects of a speaker's conduct to determine the applicability of First Amendment rights. In other words, a message is not less deserving of First Amendment protection merely because the manner used to express it serves other needs of the demonstrators. The important questions are, simply, whether the demonstrators intend to communicate a message and, viewed in context, whether it is reasonably likely that passersby will understand the message.

Judge Wilkey also observes that “[c]amping in the park . . . is not a traditional form of speech.” To some this might imply a sort of hierarchy of protection resting on the form of expression. Although I do not read Judge Wilkey’s opinion to embrace this suggestion, I would categorically reject any such implication.

Apart from these two notes, one of disagreement and one of clarification, and excluding his Part III.A., I accept Judge Wilkey’s analytical framework for an assessment of the constitutional interests in this case. When we consider the question whether there exist any less restrictive alternatives to a total ban on sleeping, however, I part company with the conclusions reached by my colleague.

If I read his opinion correctly, the essence of Judge Wilkey’s argument is that the only feasible alternatives available to the government are to permit all camping or to ban all camping.² Thus, he concludes:

If it were possible to accommodate [the appellants’] most effective mode of expression without exposing the parks to the harms anticipated by the regulation, then the First Amendment might well require that accommodation. The crucial and dispositive aspect of this case is that there is *no possibility of a constitutionally acceptable less restrictive alternative*. The Park Service must either allow all camping or abide by a flat-out ban.

(emphasis in original).³

² In this case—because the appellants do not seek to engage in certain “camping” activity and because the Park Service does not seek to prohibit all forms of “camping” activity (see note 1 *supra*)—sleeping and not full-scale camping is the only issue in dispute. Thus, the reference to a total ban here pertains solely to sleeping.

³ I find no reason to decide whether “sleeping” is, as Judge Wilkey says, the appellants’ “most effective mode of expression.” This is at best an arguable assertion and surely wholly irrelevant to our inquiry in this case.

Initially, I would note—consistent with the observation of Judge Mikva—that the Park Service does not presently impose a “flat-out ban” against all aspects of *camping*. As Judge Wilkey acknowledges, the erection and use of tents, coupled with a 24-hour presence, are integral aspects of *camping*. Nevertheless, they are not forbidden by the regulations, at least where a symbolic purpose is asserted.

More importantly, *Spence's* very sensible contextual standard for the identification of symbolic speech provides a ready basis for differentiating protected from unprotected sleeping. I have no doubt that the government may forbid sleeping in the parks that is in no sense expressive. It is of course possible, as Judge Wilkey points out, that some persons may fabricate an expressive purpose for sleeping in the parks. I, for one, however, doubt that hordes of tourists or others without an expressive purpose will descend on the parks; more comfortable accommodations are available elsewhere, and the permit application process will surely screen out many individuals who are unwilling to represent their true purpose in an official proceeding.

Nevertheless, I am willing to concede, for argument's sake, that a substantial number of persons may wish to sleep in the parks for assertedly expressive purposes. I do not believe, however, that this negates the obligation of the government to consider less restrictive alternatives to a total ban against sleeping. Our Constitution will not tolerate a total prohibition on the exercise of a constitutional right merely because a large number of persons wish to assert that right. Although reasonable time, place, and manner restrictions may be appropriate, an absolute ban on protected activity cannot be justified by the possibilities that the activity will be extremely popular or that some mischievous citizens occasionally will attempt to deceive the Park Service into believing that their conduct is expressive.

Concededly, the Park Service has legitimate interests in preventing some of the effects associated with widespread, full-scale *camping* in certain parks. In recognizing this, however, I stress that the government's interest is not in preventing sleeping *per se*, but in preventing the adverse effects associated with camping. For example, the government may legitimately seek to ensure that noncampers are not deprived of use of the parks, to prevent damage to park resources, and to minimize sanitation and law enforcement problems. But neither the District Court nor the Park Service explored ways in which these interests could be served through regulatory measures short of a total ban on sleeping in the parks.

I believe that there are several reasonable time, place, and manner restrictions that, if employed, would result in regulatory alternatives less restrictive of demonstrators' rights than a total ban against sleeping and, yet, still would accommodate the significant governmental interests at stake. For instance, in order to enforce legitimate rules against fire building, cooking or storage of personal belongings at a demonstration site, the Park Service may easily use its permit revocation procedure, *see* 36 C.F.R. § 50.19(f) (1982), to revoke the permits of demonstrators whose sleeping expands to these other impermissible areas of nonexpressive activities. I believe, moreover, that the Park Service may legitimately limit the number of persons allowed to sleep in the parks at one time (to avoid problems of health and congestion), and allocate the available space among competing groups on a first-come, first-served basis. Government officials also may limit or prevent the storage of personal belongings, and perhaps prevent any individual from sleeping in the parks beyond a specified, successive number of hours or days. This list, of course, is not intended to exhaust the possibilities, but I emphasize that any restrictions imposed by the Park Service should be the least restrictive means by which the government's legitimate purposes can be attained.

In short, I believe that the appellants' proposed sleeping is expressive in nature and that the Park Service has not justified a total ban on that activity. Although a ban on camping does serve legitimate governmental interests, those interests can be protected by means less restrictive of the First Amendment rights of the appellants and other demonstrators. I would, therefore, reverse the decision of the District Court.

GINSBURG, *Circuit Judge, concurring in the judgment*: Judge Mikva's opinion holds that the Park Service has not adequately justified the prohibition of sleeping by demonstrators granted permits to pitch sixty tents at symbolic campsites and to maintain a round-the-clock presence at those sites.¹ While I concur in the court's judgment, I find the case close and difficult.² For the reasons indicated below, I share Judge Edwards' concern

¹ Mikva Opinion at 1, 20-21.

² Judge Mikva effectively describes CCNV's position: homeless people who sleep as part of their round-the-clock protest against official neglect convey a message at least as intelligibly as many marchers under banners or speakers from soap boxes convey points of view; the CCNV demonstrators show by their presence, awake and sleeping, that they have nowhere to live. However, Judge Mikva rejects the terminal point of CCNV's argument: the homeless speak when they sleep, CCNV maintains, the nonhomeless generally do not; because the homeless are different from demonstrators for whom sleep facilitates, but does not also or as clearly embody expression, decision of CCNV's appeal is appropriately tied to their special case. Judge Mikva declines to rest his decision on this ground "because it would require the government to draw distinctions . . . depending on the subject matter or content of [a group's] message, and its alleged relationship to sleep, something the first amendment is designed to prevent." *Id.* at 16. Most members of the court concur in that view. See Dissenting Opinion of Judge Wilkey at 9-10 [hereinafter referred to as Wilkey Opinion]. Judge Mikva therefore proceeds, as Judge Wilkey observes, *id.*, from a determination that sleeping is indeed expressive in CCNV's case to the conclusion that sleeping must be allowed to "all those who wish to engage in [it] as part of their demonstration and have been granted renewable permits to demonstrate on a twenty-four hour basis on sites at which they have also been allowed to erect temporary symbolic structures." Mikva Opinion at 20. The passage from the initial determination that CCNV's sleep is expression to the conclusion that all round-the-clock demonstrators with tents may sleep in them is not a smooth one.

that this case "has a high potential to produce 'bad law.' " ³

That potential is revealed most conspicuously, I believe, in the separate dissenting opinion of Judge Scalia. His opinion would deny full free speech protection to any expression of ideas or feelings through symbols other than words. According to Judge Scalia, only "spoken and written thought" fall within the Constitution's core guarantee against government regulation "abridging the freedom of speech, or of the press." ⁴ Others have elegantly stated why Judge Scalia's narrow reading of the safeguard placed first in the Bill of Rights, his separation of language from other expressive symbols, will not do. I note such commentary ⁵ in this statement and, to avoid lengthening the packet of opinions, quote here only these relevant lines: "The Constitution protects freedom of 'speech,' which commonly connotes words orally communicated. But it would be surprising if those who poured

³ Edwards Opinion at 1.

⁴ But see Nimmer, *Symbolic Speech*, 21 U.C.L.A. L. REV. 29, 33-34 (1973):

It might be argued that "speech" within the meaning of the first amendment should encompass only those particular expressions in which the symbols employed consist of conventional words. . . . Most would agree that it is the freedom to express ideas and feelings, not merely the freedom to engage in verbal locutions, which constitutes the core meaning of the first amendment. Holmes' "free trade in ideas" may not be reduced to mere trade in words. It is the *ideas* expressed, and not just a particular form of expression, that must be protected if the underlying first amendment values are to be realized.

(Emphasis in original; footnotes omitted.).

⁵ See particularly Kalven, *The Concept of the Public Forum: Cox v. Louisiana*, 1965 SUP. CT. REV. 1; HENKIN, *The Supreme Court, 1967 Term—Foreword: On Drawing Lines*, 82 HARV. L. REV. 63, 76-82 (1968).

tea into the sea and who refused to buy stamps did not recognize that ideas are communicated, disagreements expressed, protests made other than by words of mouth or pen." Henkin, *supra* note 5, at 79. Under the First Amendment the relevant inquiry should be "whether meaningful symbols . . . are being employed by one who wishes to communicate to others"; the extent of protection should not depend upon whether words, pictures, emblems, or other comprehensible means of conveying a message are employed. Nimmer, *supra* note 4, at 61.

Numerous cases can be conceived to illustrate the arbitrary, less-than-fully baked flavor of Judge Scalia's theory. For economy, I indicate one category of examples in which his attempt at tight, tidy analysis does not yield sensible results. Assume a municipality enacts an anti-littering ordinance that prohibits distribution of unsolicited materials to passersby in streets or other public places. This ordinance is passed for health, safety, and aesthetic reasons. A person hands out leaflets on a street corner; the leaflets contain words conveying a political message. Under Judge Scalia's approach, one must balance the government's interests in clean streets against the leafleter's First Amendment interest because the anti-littering law, though aimed at the non-communicative aspect of the activity, impinges on the distribution of printed words, core "speech" for Judge Scalia.

A second person, on the same street corner, distributes small paper American flags (on Memorial Day), red poppies (on Veterans' Day), yellow ribbons (while American hostages are being held in Iran), green ribbons (while young blacks are being murdered in Atlanta), or peanuts or jelly beans (during a heated presidential campaign). The law as applied to this distributor, according to Judge Scalia, would attract only minimal scrutiny because it is aimed at the non-communicative collateral consequences of nonverbal, albeit expressive, symbols, which are not "speech" under Judge Scalia's theory. Judge Scalia would therefore presumably uphold appli-

cation of the ordinance against this distributor because it would meet the minimal rationality equal protection standard.

The second distributor's symbols, however, convey as strong a message as spoken or printed words. That the two distributors might be treated differently under Judge Scalia's theory strays far from "common and common-sense understanding." Scalia Opinion at 1. That the two might be treated *equally* under Judge Scalia's theory if the second distributor prints a word—any word—on the object distributed, demonstrates the ultimately untenable character of the attempted distinction.

I am troubled too by an idea tried out tentatively in Judge Wilkey's dissenting opinion relating to the appropriate classification of the "free speech" interest asserted. A workable approach to expressive symbols or conduct, Judge Wilkey's dissent suggests, might distinguish "traditional communicative activit[y]" (marching and picketing are so described), from non-traditional, even if equally communicative, activity (wearing armbands and displaying symbolic flags are cited in this category): all conduct would count as "speech" sheltered from "proscription specifically designed to suppress expressive connotation"; only "traditional activities" would "qualify for purposes of avoiding a general prohibition not directed at communicative content."⁶ Case law does not so compartmentalize conduct that has no purpose other than expression,⁷ and

⁶ Wilkey Opinion at nn. 33 & 34 and accompanying text; cf. Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482, 1488-89 (1975).

⁷ See *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503, 508 (1969) (students wearing black armbands to publicize their objections to the Vietnam war were involved in the exercise of "direct, primary First Amendment rights akin to 'pure speech'"); cf. *Garner v. Louisiana*, 368 U.S. 157, 201 (1961) (Harlan, J., concurring in the judgment) (church member's right to peaceful segregation is as

I do not grasp the sense of, or the need for, the suggested two-level approach.⁸ Why should marching attract full "free speech" protection while armband-wearing attracts less complete insulation; why should courts stamp speaking with one's feet "traditional" but flying a symbolic flag non-traditional?⁹

At the same time, I hesitate, more than Judge Mikva and Judge Edwards do, to treat the on-site sleep of a round-the-clock demonstrator as indistinguishable for the purpose at hand from the soap box speech, leaflet distribution, protest march, armband or flag display. CCNV's sleep may speak "poignantly" to passersby, but it is not designed "100%" as expression.¹⁰ It has a more commonly

much a part of the 'free trade in ideas,' . . . as is verbal expression").

⁸ See generally Henkin, *supra* note 5, at 76-82.

⁹ *Stromberg v. California*, 283 U.S. 359 (1931), holding unconstitutional a California prohibition on displaying a red flag as a means of political expression, was among the early cases acknowledging that "speech" may be nonverbal. Nine years later, the Court declared peaceful picketing to publicize a labor dispute constitutionally protected free speech. *Thornhill v. Alabama*, 310 U.S. 88 (1940). The Court has not been consistent in its descriptions of protest marches as a form of "speech." Compare *Edwards v. South Carolina*, 372 U.S. 229, 235 (1963) (march to State House reflected "an exercise of . . . basic constitutional rights in their most pristine and classic form"), with *Cox v. Louisiana*, 379 U.S. 559, 563 (1965) (picketing and parading described as "conduct mixed with speech"). See generally Kalven, *supra* note 5.

¹⁰ Cf. Ely, *supra* note 6, at 1495.

CCNV, in its permit request, acknowledged a non-communicative, "living accommodation" facet of the sleeping it proposed. Referring to CCNV's experience the preceding year, the request stated: "[A]bsent a survival-related reason for being in Lafayette Park—something such as a meal or the chance to sleep in relative warmth—they [the homeless] did not and would not come." Appellants' Complaint, Exhibit A at 2.

recognized aspect;¹¹ sleep enables the round-the-clock demonstrator to face the next day without exhaustion. "Speech plus" is a label that has been misused in other contexts,¹² but CCNV's case may be an instance in which the description is appropriate.

¹¹ The Court said of the flag display at issue in *Spence v. Washington*, 418 U.S. 405 (1974), intended to protest the invasion of Cambodia and the killings at Kent State University: "[I]t would have been difficult for the great majority of citizens to miss the drift of [Spence's] point at the time that he made it." *Id.* at 410. The sleeping demonstrators' message may be less quickly perceived. Passersby might observe: (1) they are certainly sleeping; (2) they may be doing so to facilitate their participation in the protest; (3) in addition to facilitating their expression, they may be sleeping as an expressive part of their protest. Sleeping, in other words, is not as securely or unambiguously seen, as is wearing an armband, displaying a flag, or marching, as a "common comprehensible form of expression." See Henkin, *supra* note 5, at 80.

¹² See *Kalven*, *supra* note 5, at 12, 23, 26-27 (labeling a public address or a pamphlet "speech pure" and a protest march "speech plus" lacks an "intelligible rationale").

Supreme Court opinions have described picketing and litigation, *inter alia*, as "speech plus." See *Brandenburg v. Ohio*, 395 U.S. 444, 455 (1969) (Douglas, J., concurring) ("Picketing . . . is 'free speech plus.' . . . That means it can be regulated when it comes to the 'plus' or 'action' side of the protest."); *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308, 326 (1968) (Douglas, J., concurring) ("Picketing is free speech *plus*, the *plus* being physical activity that may implicate traffic and related matters.") (emphasis in original); *Communist Party v. Subversive Activities Control Bd.*, 367 U.S. 1, 173 (1961) (Douglas, J., dissenting) (picketing); *NAACP v. Button*, 371 U.S. 415, 455 (1963) (Harlan, J., dissenting) ("[L]itigation, whether or not associated with the attempt to vindicate constitutional rights, is *conduct*; it is *speech plus*.") (emphasis in original). *But cf.* *Kalven*, *supra*, at 23 ("[A]ll speech is necessarily 'speech plus.' If it is oral, it is noise

Still, the personal, non-communicative aspect of sleeping in symbolic tents at a demonstration site bears a close, functional relationship to an activity that is commonly comprehended as "free speech": sleeping in the tents, rather than simply standing or sitting down in them, allows the demonstrator to sustain his or her protest without stopping short of the officially-granted round-the-clock permission. For me that linkage, while it does not mean CCNV's request should attract automatic approval, suffices to require a genuine effort to balance the demonstrators' interests against other concerns for which the government bears responsibility.

I am mindful of the Park Service argument that it has gone beyond the "free speech" requirement in permitting as many round-the-clock demonstrators as CCNV requested and as many tents, and that judgment against it would penalize the Service for its generosity. Nonetheless, in shaping rules of access to a public forum for demonstrations of ideas and protests,¹³ the Service, even when it has generously allocated time and space, must steer clear of arbitrary or incoherent regulation. Judge Mikva and Judge Edwards have suggested that controls tighter than those now in effect might be put in place by the Park Service without affront to the First Amend-

and may interrupt someone else; if it is written, it may be litter.").

I use the term "speech plus" here not to describe expressive activity "with collateral consequences that invite[] regulation," *Kalven, supra*, at 23, but to refer to conduct designed both to speak and to accomplish a more readily or commonly comprehended non-communicative purpose.

¹³ See *Kalven, supra* note 5, at 12 ("[G]enerosity and empathy with which [the] facilities [of a public forum] are made available is an index of freedom. . . . [W]hat is required is in effect a set of Robert's Rules of Order for the new uses of the public forum, albeit the designing of such rules poses a problem of formidable practical difficulty.").

ment.¹⁴ They reason, however, and I agree, that it is not a rational rule of order to forbid sleeping while permitting tenting, lying down, and maintaining a twenty-four hour presence.

In sum, in reviewing regulation of the time, place, and manner of expressive activity, I believe courts should draw no bright line between verbal speech and other comprehensible symbols of expression, or between "traditional communicative activit[y]"¹⁵ and non-traditional modes of expression. While a more rational line perhaps might be drawn distinguishing unambiguously communicative activity, traditional or not, from activity that reflects a mixture of motives, I would not draw that line in this case. The non-communicative component of the mix reflected in CCNV's request for permission to sleep at the authorized symbolic campsite facilitates expression and should therefore attract ordering rules that are sensible, coherent, and sensitive to the speech interest involved. In my view, the Park Service determination does not satisfy that measurement. I therefore concur in the court's judgment.

¹⁴ Judge Mikva observes that the Park Service may "limit the number of tents, the size of tents or campsites, and the number of persons allowed to sleep." It may "set aside certain times when no demonstrations are allowed," and, "possibly, it may be able to set aside some . . . areas . . . at which round-the-clock demonstrations are never compatible." Mikva Opinion at 25-26. Judge Edwards adds that "[g]overnment officials also may limit or prevent the storage of personal belongings, and perhaps prevent any individual from sleeping in the parks beyond a specified, successive number of hours or days." Edwards Opinion at 8. Judge Wilkey gives way to hyperbole when he suggests that these opinions exclude reasonable time, place, and manner regulation and would permit demonstrators to engage in any activity they believe "will facilitate or improve the [demonstration]." See Wilkey Opinion at 11.

¹⁵ Wilkey Opinion at 11-12.

WILKEY, with whom joined TAMM, MACKINNON, BORK, and SCALIA, *Circuit Judges, dissenting*: This case raises a number of questions concerning the protection to be afforded symbolic speech and the extent to which, by neutrally drafted and applied regulations, the government may limit First Amendment access to a traditional public forum. In particular we must decide whether a general ban on camping in the Memorial core area parks of the District of Columbia can be applied to prevent camping that constitutes an integral and expressive part of a demonstration otherwise protected by the First Amendment.

I. BACKGROUND

The Community for Creative Non-Violence (CCNV), an unincorporated religious association working on behalf of homeless persons, applied to the National Park Service for a permit to hold a demonstration in Lafayette Park and on the Mall beginning 21 December 1982. CCNV proposed to erect sixty tents in which an estimated 150 demonstrators would sleep in order to draw attention to the plight of the homeless during winter.

The Park Service granted CCNV a permit to erect two symbolic tent cities, one on the Mall with forty tents, and one in Lafayette Park with twenty tents. Permission to sleep in the tents, however, was denied pursuant to Park Service regulations governing camping and the erection of temporary structures for living accommodation.¹

CCNV and several homeless men then sued in district court for an injunction to prevent the Park Service from enforcing its regulations against them. They alleged four grounds in support of their suit: first, that the regulations are void for vagueness and overbreadth; second, that the regulations do not in fact prohibit their proposed demonstration; third, that the regulations have been discrim-

¹ See 47 Fed. Reg. 24,299-306 (1982) (to be codified at 36 C.F.R. §§ 50.19, 50.27). Set out at pp. 3-4, *infra*.

inatorily enforced in violation of their First and Fifth Amendment rights; and, finally, that the regulations cannot be construed to prevent the demonstration without running afoul of the free speech guarantees of the First Amendment.

Following a hearing, the district court denied plaintiffs' motion for a preliminary injunction and for summary judgment, and instead granted summary judgment for the Park Service.² CCNV immediately filed a notice of appeal and a motion for an injunction pending appeal, which was denied by the district court. An emergency motion for injunction pending appeal was also denied by a panel of this court.³ The appeal, however, was set for expedited *en banc* consideration to allow for a determination on the merits.

II. PRELIMINARY QUESTIONS

Three of appellants' four contentions can be disposed of without difficulty. Indeed, a mere citation of the regulations at issue suffices to show that they prohibit the sleeping proposed by CCNV and that they are neither vague nor overbroad under applicable Supreme Court precedent. Furthermore, the district court explicitly found that the regulations have not been discriminatorily enforced. This finding is supported by undisputed evidence and therefore must be upheld.

The camping regulations of the National Capital Region were revised in June of 1982 after formal rulemaking proceedings.⁴ The revisions responded to a recent decision of this court holding that a prior, almost identical demon-

² The district court delivered its judgment orally on 3 December 1982. Written Findings of Fact and Conclusions of Law followed on 9 December.

³ *Community for Creative Non-Violence v. Watt*, Nos. 82-2445 and 82-2477 (D.C. Cir. 20 Dec. 1982).

⁴ See 47 Fed. Reg. 24,299-306 (1982).

stration proposed by CCNV was *not* prohibited by the regulations as then written.⁵ The panel opinion relied upon a Policy Statement accompanying the regulations which drew a distinction between the permissible "use of symbolic campsites reasonably related to First Amendment activities" and impermissible "camping primarily for living accommodations" Noting that "the purpose of the symbolic campsite in Lafayette Park is 'primarily' to express the protestors' message and not to serve as a temporary solution to the problems of homeless people," the panel concluded that the regulations allowed appellants to sleep in the tents as an intrinsic part of their protest.⁶

No such statutory solution is available to us. As noted, the regulations were revised after the panel decision.⁷ These revisions clarify the definition of the term "camping" as used in 36 C.F.R. § 50.27, which prohibits camping in park areas not designated as public campgrounds. The revisions also clarify section 50.19, which covers the use of temporary structures in connection with permitted demonstrations and special events.

As revised, 36 C.F.R. § 50.27(a) prohibits camping in park areas not designated as public camping grounds, and defines the terms as follows:

Camping is defined as the use of park land for living accommodation purposes such as sleeping activities, or making preparations to sleep (including the laying down of bedding for the purpose of sleeping), or storing personal belongings, or making any fire, or using any tents or shelter or other structure or vehicle for sleeping or doing any digging or earth breaking or carrying on cooking activities. The above-listed activities constitute camping when it

⁵ *Community for Creative Non-Violence v. Watt*, 670 F.2d 1213 (1982).

⁶ *Id.* at 1217.

⁷ 47 Fed. Reg. at 24,299-306.

reasonably appears, in light of all the circumstances, that the participants, in conducting these activities, are in fact using the area as a living accommodation regardless of the intent of the participants or the nature of any other activities in which they may also be engaging.

Section 50.19(e)(8), as amended, permits the erection of temporary structures for the purpose of symbolizing a message or meeting logistical needs in conjunction with an authorized demonstration, but prohibits the use of temporary structures for camping outside of designated areas for

living accommodation activities such as sleeping, or making preparations to sleep (including the laying down of bedding for the purpose of sleeping), or storing personal belongings, or making any fire, or doing any digging or earth breaking or carrying on cooking activities. The above-listed activities constitute camping when it reasonably appears, in light of all the circumstances, that the participants, in conducting these activities, are in fact using the area as a living accommodation regardless of the intent of the participants or the nature of any other activities in which they may also be engaging.

There is no *single* activity that automatically triggers the application of these sections. Thus, someone might take a noon-time nap in the park without violating them. Similarly, in conjunction with a demonstration one may erect a symbolic tent in which no one will actually be sleeping or may use "support service tents" for first aid facilities, lost children areas, or to shelter electrical and other sensitive equipment or displays.* Only when all the circumstances are taken into account can it be determined with certainty whether a particular person or group is "camping" within the meaning of the regulations.

The determination required is not a difficult one. We all have a common-sense understanding of what camping

* *Id.* at 24,305.

is, and the regulations aid that understanding by giving specific examples of activities that constitute camping "when it reasonably appears, in light of all the circumstances, that the participants, in conducting these activities, are in fact using the area as a living accommodation" ⁹

Appellants propose to erect tents and to occupy those tents, by sleeping in them at night, for the remainder of winter.¹⁰ Given that "camping" is defined "regardless of the intent of the participants or the nature of any other activities in which they may also be engaging," what appellants propose is clearly camping. Appellants' First Amendment intent does not take them outside the scope of the regulations.

Furthermore, the regulations give fair notice of the prohibited conduct and provide sufficiently explicit standards to guide the discretion of law enforcement officials.¹¹ They are not impermissibly vague.¹² Neither are they overbroad. Appellants argue that their proposed camping constitutes symbolic speech meriting First Amendment protection. They further argue that the Park Service regulations impermissibly infringe upon that speech. These questions will be considered in due course.¹³ But it is not

⁹ *Id.* at 24,302.

¹⁰ See Reply to Appellees' Opposition to Appellants' Emergency Motion for Injunction Pending Appeal and Opposition to Appellants' Motion for Summary Affirmance (Appellants' Reply Brief) at 3, 8-9.

¹¹ *Village of Hoffman Estates v. Flipside, Hoffman Estates Inc.*, 455 U.S. 489 (1982); *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1971).

¹² This court has already concluded that a regulation prohibiting camping, defined in terms very similar to the current regulations, was not unconstitutionally vague. See *Vietnam Veterans Against the War v. Morton*, 506 F.2d 53, 59 (D.C. Cir. 1974).

¹³ See Part III, *infra*.

necessary to decide them in order to reject appellants' overbreadth challenge.

When, as here, an enactment is directed at conduct rather than at speech, "overbreadth scrutiny has generally been somewhat less rigid" so long as the statute regulates the conduct in a "neutral, noncensorial manner."¹⁴ "[T]he overbreadth of [such] a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep."¹⁵ Even assuming there is such a thing as "expressive camping" that merits First Amendment protection from incidental infringement, that expressive camping constitutes only a small fraction of the general camping prohibited by the regulations. It cannot be said that a general ban on camping is substantially overbroad simply because it encompasses occasional instances of expressive camping.

Finally, we agree with the finding of the district court that the Park Service has enforced its new regulations "in an even-handed and reasonable manner."¹⁶ This finding is based on and amply supported by undisputed facts contained in a number of exhibits and affidavits filed with the district court by the Park Service.

Appellants support their contention that the regulations are being enforced against them selectively and discriminatorily by referring to several past demonstrations in which sleeping allegedly occurred.¹⁷ In judging the propriety of the grant of summary judgment for the Park Service, we must assume the truth of these factual allegations.¹⁸ Even so, they fail to make out a claim of dis-

¹⁴ *Broadrick v. Oklahoma*, 413 U.S. 601, 613-15 (1973).

¹⁵ *Id.* at 615.

¹⁶ Findings of Fact and Conclusions of Law at 7.

¹⁷ See Appellants' Reply Brief at 44-51.

¹⁸ See, e.g., *Bishop v. Wood*, 426 U.S. 341, 347 (1976); *Abraham v. Graphic Arts Intern. Union*, 660 F.2d 811, 814-15 (D.C. Cir. 1981).

criminary enforcement in violation of the First and Fifth Amendments.

Some of the demonstrations relied upon by appellants¹⁹ occurred before the effective date of the current revisions and are therefore largely beside the point. As for the three demonstrations taking place after that date, it is undisputed that in each instance the Park Service notified the participants that camping and the use of temporary structures for living accommodations was prohibited.²⁰ Furthermore, in the one case where the Park Service detected a violation of the regulations, it demanded compliance and the next day, after similar violations occurred, revoked the demonstration permit for non-compliance with the regulations and conditions of the permit.²¹ A standard of reasonable, even-handed enforcement calls for no more.

¹⁹ For example, appellants cite the 1968 "Resurrection City" demonstration and the 1979 "Farmers March." A Vietnam Veterans Against the WAR (VVAW) demonstration in early May relied on by appellants also took place prior to the effective date of the amended regulations. However, the Park Service applied the new regulations to that demonstration, yet still authorized at least some participants in the demonstration to "be asleep in the area at all times during the night." Letter from Park Service to VVAW dated 22 April 1982, *reprinted in* Record Document (RD) 5. In that case, however, the sleeping was incidental to an all-night vigil at a mock Vietnam War-era "firebase" at which the demonstrators took turns standing symbolic "guard duty." Since no tents or other structures were used by the VVAW, the Park Service determined that the demonstration did not constitute "camping" within the meaning of the new regulations.

²⁰ See Letter from Park Service to Assoc. of Community Organizations for Reform Now dated 18 June 1982; Letter from Park Service to Palestine Congress of North America dated 8 September 1982; Letter from Park Service to Arab Women's Council dated 28 July 1982, all *reprinted in* RD 5.

²¹ Findings of Fact and Conclusions of Law at 8.

At best appellants are able to cite two isolated instances of undiscovered violations of the regulations.²² The district court rightly noted that this evidence failed to create a genuine issue of material fact.

The existence of possible undiscovered violations of the law is not the material issue here. Rather, the issue is whether or not there existed a policy or practice by the Park Service of permitting activities by other persons in violation of the regulations. Since plaintiffs' evidence goes only to the former proposition, not to the latter, it fails to establish a policy of discriminatory enforcement.²³

III. FIRST AMENDMENT CLAIM

We come, then, to the main focus of contention in this case. Appellants argue that the Park Service regulations, if construed to prohibit their proposed demonstration, impermissibly infringe upon rights guaranteed by the free speech clause of the First Amendment.

A. *Standard of Review*

As a preliminary matter, we must determine whether the camping proposed by appellants is properly considered "speech" for purposes of the First Amendment protection claimed here. Thus, in *United States v. O'Brien*,²⁴ the case principally relied upon by Judge Mikva to establish his standard of First Amendment scrutiny, the Supreme Court began its analysis as follows:

We cannot accept the view that an apparently limitless variety of conduct can be labeled "speech" whenever the person engaging in the conduct intends thereby to express an idea. However, even on the assumption that the alleged communicative ele-

²² See Appellants' Reply Brief at 54.

²³ Findings of Fact and Conclusions of Law at 20-21.

²⁴ *United States v. O'Brien*, 391 U.S. 367, 376 (1968).

ment in O'Brien's conduct is sufficient to bring into play the First Amendment, it does not necessarily follow that the destruction of a registration certificate is constitutionally protected activity.

Since the Court in *O'Brien* found that the governmental prohibition satisfied even the heightened scrutiny appropriate for laws that incidentally infringe on protected expression, it was not constrained to go back and reexamine the validity of its assumption that First Amendment standards of scrutiny applied. Judge Mikva, however—at least if he intends to rely upon *O'Brien*—must do so. He must validate the credentials that admit sleep, in this case, to the realm of the First Amendment without providing a blanket pass to “an apparently limitless variety of conduct [that] can be labeled ‘speech.’”²⁵ No easy task, and not one which Judge Mikva has in our view successfully executed.

The attempt is made in an earlier portion of the opinion,²⁶ where two responses are given. First, the “indicia of political expression . . . permeate CCNV's pointed use of the simple act of sleeping.”²⁷ To determine communicativeness, Judge Mikva examines “the intent of the would-be communicator and the context in which his or her conduct takes place.”²⁸ One might suppose from this, and from the quotation from Supreme Court authority which follows, that Judge Mikva means that here sleeping is a particularly *apt* method of expressing homelessness, the idea to be conveyed. Several pages later, however, the opinion abjures such an intent, warning (quite correctly, in our estimation) that basing the present decision upon CCNV's contention that “sleeping in its demonstration is uniquely deserving of first amendment pro-

²⁵ *Id.*

²⁶ Mikva Op. at 11-17.

²⁷ *Id.* at 14.

²⁸ *Id.* at 12.

tection because it directly embodies the group's message . . . would require the government to draw distinctions among groups desiring to express themselves through sleeping depending on the subject matter or content of their message and its alleged relationship to sleep" ²⁹ We add that it would also require the Park Service, and ultimately the courts, to make judgments that are more appropriate for Ingmar Bergman and Andy Warhol.

But if this symbolism-evaluation is not what Judge Mikva has in mind, then we are at a loss to understand the point. Does it mean that, *since* the particular activity of sleeping is expressive in this case (the one-and-only time we will engage in symbolism-evaluation for this particular category of conduct) it must *always* be assumed to be expressive in the future—so that hereafter one can sleep in the parks to protest war or to protest peace, to protest the arms race or to protest unilateral disarmament, all indiscriminately under the protection of the First Amendment? ³⁰

Judge Mikva's second basis for avoiding the preliminary inquiry of *O'Brien* is that the sleeping is part of a demonstration that is itself sufficiently communicative to implicate the First Amendment. In other words, "even were we not to focus on the peculiarly expressive nature of sleeping, first amendment scrutiny would still be implicated." ³¹ The idea seems to be that the First Amendment gives CCNV the freedom to shape the nature of its own demonstration and, therefore, a higher standard must be applied to justify the suppression of all requested ele-

²⁹ *Id.* at 16.

³⁰ See *id.* at n.16 ("demonstrators should be held to no higher standard than the advancement of a plausible contention that their conduct is intended to, and in the context of their demonstration likely will, express a message").

³¹ *Id.* at 15.

ments of that demonstration—including those that are not even intended to be independently communicative.³² We cannot accept this reasoning, which suggests that since, for example, a protest march (a traditional form of expressive conduct) cannot be banned without meeting the high First Amendment standards applicable to incidental infringements on speech, neither can any of the other activities which the organizing group believes will facilitate or improve the march.

We think that is plainly wrong. Not a whit more justification is needed to ban spitting in the street by a parade of tobacco farmers protesting a new tax on chewing tobacco than is needed to prevent such activity by the public at large. Any group's freedom to shape the nature of its own demonstration is limited by the well-established permissibility of "time, place and manner" limitations—the reasonableness of which is established so long as the First Amendment activity itself (the speech, the pamphleteering, the parade) is not needlessly impeded, regardless of the effect on ancillary phenomena. It is hard to believe that the limiting language in *O'Brien*, quoted above, means no more than that inherently unexpressive conduct need only be joined with expressive conduct or speech in order to qualify for First Amendment protection.

The Supreme Court cases, it must be acknowledged, do not provide guidance as to what conduct beyond traditional communicative activities such as marching and picketing may qualify as "speech." It might be suggested that only such traditional activities qualify for purposes of avoiding a general prohibition not directed at communicative content—while virtually all conduct is "speech" for purposes of avoiding a proscription speci-

³² *Id.* ("whatever the particular form of the protestors' presence at night, their presence itself implicates the first amendment").

fically designed to suppress expressive connotation.³³ While this analysis may be consistent with the holdings of the Court, it is difficult to square with the fact that the *O'Brien* test itself (applied only after conduct has been assumed entitled to full "free speech" protection), contains a step that inquires into the communication-suppressing nature of the law. Unlike Judge Mikva, we find it unnecessary to solve this dilemma in the present case. Like the Supreme Court in *O'Brien*, we find that even assuming the applicability of the more demanding First Amendment standard of review, the regulations here pass muster.³⁴

The standard of review provided by *O'Brien* is as follows:

[A] government regulation is sufficiently justified if it is within the constitutional power of the government; if it furthers a substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged first amendment freedoms is no greater than is essential to the furtherance of that interest.³⁵

³³ See, e.g., *Spence v. Washington*, 418 U.S. 405 (1974) (per curiam); *Tinker v. Des Moines School District*, 393 U.S. 503 (1969).

³⁴ It may well always be true that conduct which should not in the first place have been accorded full First Amendment "speech" protection will, even assuming such protection, readily be proscribable under the *O'Brien* test. Applying this test on a case-by-case basis does, however, impose a considerable burden upon administrators and the courts, and may produce erroneous judgment which (so long as they are not adverse to demonstrators) are not appealable to the courts. We do not, therefore, deprecate the value of the more direct approach which both the *O'Brien* court and we have avoided; but in the absence of further clarification from the Supreme Court we take the safer course for the present.

³⁵ 391 U.S. at 377.

The first requirement, that the regulation be within the constitutional power of the government, is rarely a problem. The second and fourth requirements come together to constitute a balancing test, as discussed below.³⁶ Before one even reaches that balancing test, however, the interest offered by the government to support its regulation must meet the threshold requirement that it be "unrelated to the suppression of free expression." In other words, any burden imposed on free expression must be incidental to the prevention of a harm that arises regardless whether any message is conveyed. To illustrate, an attempt to curtail littering by banning handbills is not directed at any message to be conveyed. The feared harm would arise even if the handbills were blank.³⁷ Similarly, a ban on sound trucks is designed to prevent noisy disturbances, a harm that would arise even if the sound truck merely emitted static or other meaningless sounds.³⁸ An attempt to curtail the incitement of lawless action, on the other hand, is directed at a harm arising from the specific viewpoint expressed.³⁹ Similarly, a ban on foul language is concerned with the effects of the ideas or emotions expressed on the minds or conduct of those listening.⁴⁰ In these latter cases, the regulation will not survive judicial scrutiny unless the proscribed expression falls into one of several narrowly defined, unprotected categories.⁴¹

³⁶ See p. 14, *infra*.

³⁷ See *Schneider v. New Jersey*, 308 U.S. 147 (1939); Ely, *Flag Desecration: A Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482, 1486-87 (1975).

³⁸ See *Kovacs v. Cooper*, 336 U.S. 77 (1949).

³⁹ See *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (*per curiam*).

⁴⁰ See *Cohen v. California*, 403 U.S. 15, 21-22 (1971).

⁴¹ See, e.g., *Paris Adult Theater I v. Slaton*, 413 U.S. 49 (1973) (obscenity); *Brandenburg v. Ohio*, 394 U.S. 444

In the former set of cases, where the threshold test is met, then under *O'Brien* a balancing test is proper: the state must counterbalance any incidental infringement on free speech by showing that the regulation narrowly pursues a substantial governmental interest. This is properly characterized as a "balancing" test, because the greater protection that could be afforded speech by a less restrictive alternative must be balanced against that alternative's loss of efficiency in achieving the government's objective.⁴²

In this case, the governmental interest alleged, the protection of the parks in the Memorial core area from physical and aesthetic damage caused by camping, is clearly unrelated to the suppression of free expression. The harm is the same whether appellants hope to express a message by camping or not. Thus, the court must balance the substantiality of the government's interest in preventing camping against the incidental infringement on free speech, taking due note of the possibility of any less restrictive alternative.

B. *Application of Standard*

The three concepts upon which this case turns, "substantial interest," "incidental infringement," and "less restrictive alternative," are inherently vague. However, enough can be said about each, as applied to this case, to leave no doubt as to the proper result.

1. *Substantial Interest*

Our first responsibility is to determine the exact nature and scope of the governmental interest called into ques-

(1969) (per curiam) (advocacy of imminent lawless action); *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942) (fighting words).

⁴² See Ely, *supra* note 37, at 1482-90; Farber, *Content Regulation and the First Amendment: A Revisionist View*, 68 GEO. L.J. 727, 742 n.83 (1980).

tion by this case. It is easy to make a mistake here, improperly expanding or contracting the scope of that interest. Two cautions are necessary. We should look to the regulations *as applied* to this case to determine the relevant class of activities that the government is interested in banning.⁴³ But we should not, in judging the substantiality of the interest underlying that ban, limit our consideration to the harms that might be caused by a particular sub-class of persons, such as appellants, desiring to perform those activities. In other words, we look to the overall benefit to be had from the general application of the regulations, but our understanding of the "regulations" is refined by reference to the activities in which appellants actually propose to engage.

Some of our colleagues seem to feel that in judging the substantiality of the government's interest the proper focus in this case is on the incidental harm that would be caused by allowing *these appellants* to sleep in the park as part of their proposed demonstration. They are mesmerized by the following scenario: the Park Service has already issued a demonstration permit that will allow appellants to construct a "symbolic city" and to maintain a round-the-clock presence at the site. Appellants may put up tents. They can place within those tents sleeping bags, cots, and other bedding materials. They can sit in the tents twenty-four hours a day. They can even lie down, close their eyes and feign sleep. The only thing they cannot do is actually fall asleep. What additional harm to the parks could possibly be caused by allowing appellants actually to sleep rather than merely feigning sleep?

⁴³ The absurdities to which an alternative approach could lead are readily apparent. The government could make any regulation invincible by tacking on a prohibition that is undoubtedly supported by a substantial interest but has nothing to do with the usual application of the regulation, such as "Camping and the detonation of hand grenades is forbidden in the parks of the Memorial core area."

This approach to the question at issue here misconceives the relevant First Amendment inquiry. The apparent absence of harm that would be caused by granting these appellants an exemption from the no-camping regulations may indicate that we should look for a possible, less restrictive alternative to the present regulations. It does not, however, in any way undermine the substantiality of the interest supporting the regulations as now written and applied generally by the Park Service. The Supreme Court has stated explicitly that in judging the substantiality of the government's interest we must look to the interest supporting the law generally, *not* the interest to be served by applying it in any particular case. The alternative is to nickel and dime every regulation to death.

The point was made most clearly and emphatically in the recent case of *Heffron v. Int'l Soc. for Krishna Consc.*⁴⁴ In that case a rule of the Minnesota Agricultural Society, a public corporation that operates the annual state fair, required all persons, groups or firms desiring to sell, exhibit, or distribute materials during the fair to do so only from fixed locations. The International Society for Krishna Consciousness, Inc. (ISKCON) claimed the rule violated their First Amendment rights because it suppressed the practice of Sankirtan, a religious ritual that enjoins its members to go into public places to distribute or sell religious literature and to solicit donations for the support of the Krishna religion. The Minnesota Supreme Court agreed.

The Minnesota Supreme Court recognized that the state's interest in the orderly movement of a large crowd and in avoiding congestion was substantial and that rule 6.05 furthered that interest significantly. Nevertheless, the Minnesota Supreme Court declared that the case did not turn on the "importance of the state's undeniable interest in preventing the widespread disorder that would surely

⁴⁴ 452 U.S. 640 (1981).

exist if no regulation such as rule 6.05 were in effect" but upon the significance of the state's interest in avoiding whatever disorder would likely result from granting members of ISKCON an exemption from the rule. Approaching the case in this way, the court concluded that although some disruption would occur from such an exemption, it was not of sufficient concern to warrant confining the Krishnas to a booth.⁴⁵

The United States Supreme Court, *applying free speech* (not freedom of religion) *principles*,⁴⁶ rejected this approach and upheld the rule. "The justification for the Rule should not be measured by the disorder that would result from granting an exemption solely to ISKCON."⁴⁷

A similar mistake would be to focus our attention at this time solely on the harm that would be caused by allowing "First Amendment" camping (*i.e.*, camping by any group, not just appellants, for whom the camping was an integral part of the message to be conveyed). Again, such an inquiry might indicate that we should look for a possible, less restrictive alternative to the present regulations. But it bears no relevance to the initial question of whether the regulations as now written and applied are supported by a substantial interest. Thus, in *United States v. O'Brien*,⁴⁸ the court focused on the government's interest generally in preventing the destruction or mutilization of registration certificates, whether or not that destruction or mutilization is for a First Amendment purpose. Again, any other approach would nickel and dime every regulation to death.

Thus, in the instant case, we must not measure the substantiality of the governmental interest by looking solely

⁴⁵ *Id.* at 651-52.

⁴⁶ *Id.* at 652-53.

⁴⁷ *Id.* at 652.

⁴⁸ 391 U.S. at 378-82.

to the harm that might be caused by allowing these particular appellants to sleep in the park. Nor may we measure that interest by looking only to the harm that would be caused by allowing "First Amendment" camping. Rather, we must look to the interest in preventing camping by all classes of persons, whatever their motive.

Having fixed the relevant class of persons by reference to whom the interest in banning camping should be judged, we must still be very careful in stating what we mean by "camping." In this sense, the claims of these particular appellants *are* relevant. They do not propose to build fires, dig latrines, cook, etc. They propose only to erect tents, lay out bedding materials, and sleep through the nights for an extended period. Thus, we must judge the substantiality of the government's interest in preventing this class of activities. We do not add cooking, building fires, and digging latrines as make-weights because, even though they are forbidden by the regulations, appellants disclaim any intention of such activity.

The point made above is merely that we should not limit our consideration to a *sub-class of persons* desiring to perform these activities, such as appellants alone or, even, all those with a First Amendment purpose. But we must and do limit our attention to the *class of activities* actually called into question by this case. Thus, "camping" as used in the remainder of this opinion is limited to such activities as erecting tents or other structures, laying out blankets, sleeping bags, and other bedding materials, and sleeping.

The governmental interest called into question by this case is the prevention of harm that would be caused by camping, in the above sense, in the Memorial core area parks. However, a round-the-clock presence and the erection of symbolic structures, including tents, is allowed by the regulations in conjunction with a demonstration. Thus, the governmental interest is limited to the *incre-*

mental harm which would be caused by permitting camping generally (i.e., not just for First Amendment purposes) *in addition to* the erection of tents and a 24-hour presence for demonstration purposes.⁴⁹

* Even as so stated, however, the substantiality of the governmental interest cannot be doubted. The proverbial "straw that broke the camel's back" is a valid and useful concept. The Park Service may in all good faith strive to be lenient, but nevertheless it is entitled to draw the line somewhere. If camping, *whatever the purpose*, were allowed in the parks of the Memorial core area, those parks would be overrun by campers during the summer months—the grass would be ruined, litter and human waste would abound, and the pleasure noncampers take in those parks would be ruined.

⁴⁹ Judge Edwards suggests that "the only matter in dispute is *sleeping*," since "the Park Service has not sought to ban the appellants from erecting tents, laying out blankets or bedding, or even maintaining a 24-hour presence." Edwards Op. at n.1. *See also id.* at 6. We think this is an unduly narrow characterization of what is at stake in this case. The regulations permit a round-the-clock presence and the erection of symbolic structures, including tents, *for demonstration purposes*. They do not permit a 24-hour presence or the erection of any structures *for purposes of living accommodation*. As we explain below, *see* Section III(B) (3), the only way the Park Service can maintain this distinction is by refusing to allow demonstrators to sleep in addition to their other activities. It is sleep that would provide the incentive for non-demonstrators and, perhaps, many demonstrators to erect structures and remain through the night. Unused tents and a nighttime vigil will only be employed for purposes of expression. If the convenience of sleep were added, the Park Service would be unable to distinguish between the symbolic and non-symbolic use of structures and nighttime vigils. Thus, the broader regulatory scheme, which forbids non-demonstrators to erect structures and remain round-the-clock as well as forbids all persons to sleep, is at stake in this case. We will, therefore, continue to speak of "camping," and not merely "sleeping."

No such consequences can be anticipated from allowing symbolic structures and a 24-hour presence in the parks. Citizens are only likely to avail themselves of the latter privileges in order to express themselves on pressing issues, whereas camping would be useful to any tourist or visitor interested in minimizing expenses. Furthermore, the potential harm to the parks from persons who actually live there for their own convenience, persons who don't go home to eat, to wash, to sleep, to answer nature's call, etc., exceeds that to be expected from persons erecting symbolic structures or maintaining a wakeful vigil for First Amendment purposes.

It is important once again to recall that we are not yet concerned with the possibility of a less restrictive alternative that would permit First Amendment camping, while denying permission to all other campers. The regulations as written ban all camping, and it is the interest underlying that ban that we must now weigh. As the Park Service has noted, the parks in the Memorial core area, including the Mall and Lafayette Park, are simply unsuited for camping.⁵⁰ To permit camping would deprive other groups of the right to use nationally significant space. It would cause significant damage to park resources and a substantial increase in costs for park restoration, sanitary facilities, and extra park personnel.⁵¹ Accordingly, the governmental interest supporting the ban on camping and the erection of structures for living accommodation is substantial.

2. Incidental Infringement on Speech

In most of the symbolic speech cases, the activity that the government attempted to suppress was inherently expressive. Ninety-nine out of a hundred people who pur-

⁵⁰ 47 Fed. Reg. at 24,301.

⁵¹ Findings of Fact and Conclusions of Law at 6.

posely burn their draft cards,⁵² wear arm bands,⁵³ or superimpose a peace symbol on the flag,⁵⁴ will do so in order to express something thereby. Thus, a prohibition of that activity can have a substantial, even if incidental, impact on speech.

Camping as symbolic speech presents a very different case. Camping in the park has a great deal of independent significance. It is not a traditional form of speech. It has expressive First Amendment value only in a very limited set of circumstances.⁵⁵ Thus, if camping in the Memorial core area parks were permitted, the vast majority of those availing themselves of the privilege would not be intending to express anything thereby. Conversely, the incidental infringement on speech caused by an absolute ban on camping in these areas is simply not that great relative to the government's interest in preventing camping generally.

Appellants may well have hit upon the most expressive means of conveying their message. But they have also stated explicitly that their desire to camp in the parks is based *not* just on the expressive nature of those activities under the peculiar facts of this case, *but also* on the fact that camping would facilitate the expression both by attracting demonstrators and by capturing media attention. On the former point, appellants' original application is clear. "Without the incentive of sleeping space or a hot meal, the homeless would not come to the site."⁵⁶

⁵² See, e.g., *United States v. O'Brien*, 391 U.S. 367 (1968).

⁵³ See, e.g., *Tinker v. Des Moines School District*, 393 U.S. 503 (1969).

⁵⁴ *Spence v. Washington*, 418 U.S. 405 (1974) (per curiam).

⁵⁵ However, as we shall see, pp. 25-29, it would be impossible to fashion "narrow, objective, and definite" standards that would limit permission to camp to those few cases where camping is expressive.

⁵⁶ Letter from CCNV to Park Service (undated), reprinted in RD 5.

This statement is constantly echoed in the papers filed with this court.⁵⁷ The latter point follows from the former. Without homeless people coming to demonstrate the poignancy of their plight, the media value of the message is sadly diminished, despite the unabated poignancy of that plight.⁵⁸

The Supreme Court has noted time and again that although the First Amendment guarantees individuals and groups the right to deliver their message, it does not guarantee any right to deliver that message in the most effective manner possible.⁵⁹ It does not guarantee media attention. Nor does it guarantee circumstances that will attract the largest number of demonstrators.⁶⁰ Appellants' concerns in this case are not limited to a fear that their message, purely in terms of its content, will be diluted. They fear at least as much that the effect of their message, however well expressed, will be diminished.

Of course, we must not make the "category mistake" noted above in conjunction with the substantial interest test. Just as the substantiality of the government's interest must be judged by the effect of the law on all persons, so, too, the extent to which it infringes upon speech must be judged by the effect of the law on all persons,

⁵⁷ Appellants' Emergency Motion for Injunction Pending Appeal at 21-22; Appellants' Reply Brief at 6-7.

⁵⁸ See Appellants' Emergency Motion for Injunction Pending Appeal at 21-22; Appellants' Reply Brief at 6-7.

⁵⁹ See, e.g., *Heffron v. Int'l Soc. for Krishna Consc.*, 452 U.S. 640, 647 (1981); *Adderly v. Florida*, 385 U.S. 39, 47-48 (1966); *Lloyd Corp. v. Tanner*, 407 U.S. 551, 567 (1972).

⁶⁰ What the litigant's press agent seeks and what the public interest requires differ widely. Although every man is entitled to make his remonstrance, no man is entitled to make such a remonstrance that it will be carried on all three television networks.

Vietnam Veterans Against the War v. Morton, 506 F.2d 53, 58 (D.C. Cir. 1974).

and not just by its effect on the appellant. However, the conjunction of the facilitative and expressive aspects of camping in this case is likely to be paralleled in all other First Amendment camping cases. The convenience of the demonstrators and the media value of their message will rival in importance the First Amendment aspects of the camping and thereby further diminish the claim that their First Amendment interest is substantial relative to the government's interest in preventing camping generally.

Judge Edwards correctly notes that "a message is not less deserving of First Amendment protection merely because the manner used to express it serves other needs of the demonstrators."⁴¹ But where there are plenty of alternative ways to express the same message—ways which, though less convenient to the demonstrators, are not fraught with the same harms to legitimate governmental interests—the First Amendment does not extend special protection to the means chosen by the demonstrators, especially where those means are chosen as much for convenience as for expressive value. To repeat, the First Amendment does not guarantee any right to deliver a message in the most effective manner possible. Nor does it guarantee any right to deliver a message in the most convenient way possible.

In sum, the substantiality of the government's interest in preventing camping generally in the Memorial core area parks appears to counterbalance the occasional, incidental infringement on speech caused by the regulations.

3. *Less Restrictive Alternative*

It is important to recognize that appellants wish to conduct their demonstration in a park, a forum traditionally open to the public "for purposes of assembly, communicating thoughts between citizens, and discussing pub-

⁴¹ Edwards *op.*, at 5.

lic questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens.”⁶² Modes of First Amendment activity, such as leafletting and demonstrating, which can be banned from certain locations, such as courthouses,⁶³ jails,⁶⁴ and private shopping centers,⁶⁵ cannot be abridged or denied in traditional public forums such as the streets⁶⁶ and parks.⁶⁷ The right to speak in a public forum may be regulated in the interest of all, “but it must not, in the guise of regulation, be abridged or denied.”⁶⁸

Appellants argue, relying on this notion that the park is a public forum, that the government must permit exceptions to its ban on camping where the camping is an integral part of First Amendment expression. In other words, appellants argue that the mere fact that the ban is neutral and supported by a substantial governmental interest is insufficient. Some affirmative accommodation of First Amendment interests is necessary in a public forum.

The total ban on “camping” sweeps within its purview First Amendment activities that pose no danger to the alleged governmental interest. Prohibition of peaceful sleeping inside lawfully erected tents as part of a demonstration serves no purpose

⁶² *Hague v. CIO*, 307 U.S. 496, 515 (1939) (Roberts, J., concurring).

⁶³ See, e.g., *Cox v. Louisiana*, 379 U.S. 559 (1965).

⁶⁴ See, e.g., *Adderly v. Florida*, 385 U.S. 39 (1966).

⁶⁵ See, e.g., *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972).

⁶⁶ See, e.g., *Schneider v. New Jersey*, 308 U.S. 147 (1939).

⁶⁷ See, e.g., *Niemotko v. Maryland*, 340 U.S. 268 (1951); *Saia v. New York*, 334 U.S. 558 (1948).

⁶⁸ *Hague v. CIO*, 307 U.S. at 516.

other than to impermissibly suppress free expression.⁶⁹

Anatole France once said: "The law in its majestic equality forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread."⁷⁰ The sarcasm is salutary. Appellants are among the most helpless members of our society. They are likely to be uneducated and inarticulate. If it were possible to accommodate their most effective mode of expression without exposing the parks to the harms anticipated by the regulation, then the First Amendment might well require that accommodation. The crucial and dispositive aspect of this case is that there is *no possibility of a constitutionally acceptable less restrictive alternative*. The Park Service must either allow all camping or abide by a flat-out ban. Any intermediate position designed to accommodate "First Amendment camping" would run afoul of the proscriptions against discretionary screening contained in a long line of Supreme Court cases.⁷¹ The Supreme Court has, in effect, endorsed Anatole France's "majestic equality" as applied to free speech because only totally objective standards will suffice in this area, whatever differentiations there may be in welfare policies.

The teaching of this line of cases is that licensing regulations, to pass constitutional scrutiny, must contain "narrow, objective, and definite standards to guide the licensing authority,"⁷² and thereby protect against arbitrary action or *de facto* censorship of certain points of view. It is just such standards that would be impossible to formulate if the court tried to carve a First Amend-

⁶⁹ Appellants' Reply Brief at 63.

⁷⁰ A. FRANCE, *LE LYS ROUGE* (1894) ch. 7.

⁷¹ *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150-153 (1969); *Niemotko v. Maryland*, 340 U.S. 268, 271-72 (1951); *Kunz v. New York*, 340 U.S. 290, 294 (1951); *Lovell v. Griffin*, 303 U.S. 444, 450-51 (1938).

⁷² *Shuttlesworth v. City of Birmingham*, 394 U.S. at 151.

ment exception out of the ban on camping. First Amendment standards cannot themselves be used to state an exception to a neutral regulation of conduct.

The force of this point can be seen by considering the following three examples, asking in each instance whether the Park Service would have to grant a permit to camp under a judicially mandated First Amendment exception to the ban on camping.

- (1) A group of tourists comes to D.C. during the summer. Rather than pay to stay in a hotel, they apply for a permit to camp on the Mall "to dramatize and protest against the high cost of hotels."

At oral argument appellants stated that this would be a "frivolous case." We agree. But according to what standard is the Park Service to deny the permit? The Park Service cannot be permitted to discriminate between applicants based on the supposed substantiality of their message. That would be content screening in its most blatant form. "[A]bove all else, the First Amendment means that the government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."¹³ Nor could the Park Service screen applicants on the basis of their sincerity, their commitment to the message they are trying to convey. It is not for the Park Service to decide who really believes that high hotel prices are harmful to the republic and should be regulated by government and who just wants a free place to sleep.

The problem stems from the fact, noted above, that many people, without any First Amendment purpose, would like to camp. The benefits of camping in a convenient location on the Mall will provide them with an incentive to offer a First Amendment pretext for the

¹³ *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 95 (1972). See also *Carey v. Brown*, 447 U.S. 455, 466-67 (1980).

camping. On the other hand, few would go to the trouble of erecting a temporary structure on the Mall or maintaining a wakeful 24-hour vigil unless they wanted to express *something* thereby, however inane or frivolous. There could be little other reason for erecting such structures or maintaining such a vigil. Thus, the question of sincerity doesn't arise, and, consequently, the Park Service need not distinguish between substantial and frivolous messages. Applicants for a permit are left to determine for themselves whether their message is "significant" enough to be worth the trouble.

Where camping is concerned the problem of pretextual or frivolous speech is much more important. Presumably, there are a great many people who would like to camp on the Mall or in Lafayette Park, at least during the summer, and would do so if permitted. If we force the Park Service to open the gate for this group because of their sincerity and the substantiality of their message, we will force the Park Service either to screen applicants on that basis or to permit anyone to camp who is willing to offer a First Amendment rationalization, however ludicrous or improbable.

(2) A citizen, in order to demonstrate the depth of his commitment to arms control, resolves to remain in Lafayette Park until all nuclear weapons are destroyed.

Here the message is obviously substantial, and the citizen's commitment to it we may assume is sincere. But the Park Service, to keep him from making Lafayette Park his home for the rest of his life, would have to deny the permit on the grounds that the mode of expression (camping) is not sufficiently related to the message to be conveyed to justify giving the citizen permanent squatter's rights. In other words, he can make his point by other, less intrusive means. But how is the Park Service to make such a determination with any clarity? Suppose the citizen's tent were shaped like a coffin and he maintained that

his constant presence was necessary to dramatize the unnatural death that awaits us all. Can we really expect the Park Service in issuing a permit to decide in each case whether the fit between the means employed and the message to be conveyed is close enough to justify the particular means? We cannot; at least not without running afoul of the constitutional requirement that standards be "narrow, objective, and definite."

The point of these two examples is that First Amendment standards cannot themselves be used to state an exception to a neutral regulation of conduct. The First Amendment does not provide sufficiently "narrow, objective and definite standards" to guide a licensing authority. We cannot simply say: First Amendment camping may not be banned, even though all other camping is banned.

The final example presents an extreme case of the frivolous speech problem. It demonstrates that any attempt to create an explicit First Amendment exception to a neutral regulation of conduct itself provides a fool-proof means of evading that regulation.

(3) This court rules that the Park Service must permit a First Amendment exception to its ban on camping in the Memorial core area parks. A group of citizens here on holiday, with homes of their own and no particular gripe with hotel prices (other than a disinclination to pay them), applies for a First Amendment camping permit "to demonstrate the absurdity of the holding of the D.C. Circuit Court of Appeals that allows us to camp on the Mall."

Here, the message is substantial, the parties might well be sincere, and the means-end fit is perfect. The Park Service, it appears, would have no choice but to issue the permit. In other words, if we create a First Amendment exception to the ban on camping, the exception will completely swallow the rule. Anyone and everyone who is willing to apply for a permit and recite the above First

Amendment purpose must be allowed to camp, subject to a first come-first served limitation.⁷⁴

In sum, it is not possible to construct a less restrictive alternative to the flat-out ban on camping at issue here. Thus, given that the governmental interest supporting the total ban is substantial and that the incidental infringement on free expression, relative to the valid purposes served by the rule, is not significant, the regulation should be upheld.

As evidenced by the four opinions reflecting the views of our six colleagues agreeing on the result, it seems apparent that they are quite sure that these appellants should be allowed to sleep in Lafayette Park, but they have had great difficulty in figuring out why. We five in dissent, assuming that free speech principles apply, find no difficulty in sustaining this Park Service regulation permitting every type of communicative action, but drawing the line at "camping," *i.e.*, actually occupying living accommodations in Lafayette Park 24 hours a day for days on end. *United States v. O'Brien, supra*; *Heffron v. Int'l Soc. for Krishna Consc., supra*.

⁷⁴ Judge Mikva chides us for ignoring the "obvious alternative of revoking a demonstration's permit should its participants engage in non-sleep 'camping' activities." Mikva Op. at n.32. It is not clear what he means by this, however, in light of his earlier acknowledgement that the activities proposed by appellants themselves constitute "camping" within the meaning of the new regulations. *See id.* at 10. His meaning is further confounded by a citation from our opinion which he says "underscore[s] the potential effectiveness of permit revocation as a means of enforcing the Park Service's anti-camping regulations" *Id.* at n.32. It is precisely those regulations which Judge Mikva's opinion disables. If they can't be used to *deny* a permit for "First Amendment camping" (a category, we have explained, that cannot be given viable boundaries), then surely they can't be used to *revoke* a permit for that same camping.

SCALIA, *Circuit Judge, dissenting*, with whom *Circuit Judges* MACKINNON and BORK concur: I concur with the principal dissent in this case because I agree that, if traditional First Amendment analysis is applied to this sleeping, on the assumption that it is a fully protected form of expression, the appellants would nonetheless lose. I write separately to express my willingness to grasp the nettle which the principal dissent leaves untouched, and which the opinions supporting the court's disposition consider untouchable—that is, flatly to deny that sleeping is or can ever be speech for First Amendment purposes. That this should seem a bold assertion is a commentary upon how far judicial and scholarly discussion of this basic constitutional guarantee has strayed from common and common-sense understanding.

I start from the premise that when the Constitution said “speech” it meant speech and not all forms of expression. Otherwise, it would have been unnecessary to address “freedom of the press” separately—or, for that matter, “freedom of assembly,” which was obviously directed at facilitating expression. The effect of the speech and press guarantees is to provide special protection against all laws that impinge upon spoken or written communication (which I will, for the sake of simplicity, refer to generically as “speech”) even if they do so for purposes that have nothing to do with communication, such as the suppression of noise or the elimination of litter. But to extend *equivalent* protection against laws that affect actions which happen to be conducted for the purpose of “making a point” is to stretch the Constitution not only beyond its meaning but beyond reason, and beyond the capacity of any legal system to accommodate.

The cases find within the First Amendment some protection for “expressive conduct” apart from spoken and written thought. The nature and effect of that protection, however, is quite different from the guarantee of freedom of speech narrowly speaking. It involves a significantly different balancing of private rights and public interests,

and does not always call for the detailed "First Amendment analysis" characteristic of the speech cases and applied by the majority opinions here. Specifically, what might be termed the more generalized guarantee of freedom of expression makes the communicative nature of conduct an inadequate *basis* for singling out that conduct for proscription. A law *directed at* the communicative nature of conduct must, like a law directed at speech itself, be justified by the substantial showing of need that the First Amendment requires. But a law proscribing conduct for a reason having nothing to do with its communicative character need only meet the ordinary minimal requirements of the equal protection clause.¹ In other words, the only "First Amendment analysis"² applicable to laws that do not directly or indirectly impede speech is the threshold inquiry of whether the purpose of the law is to suppress communication. If not, that is the end of the matter so far as First Amendment guarantees are concerned; if so, the court *then* proceeds to determine whether there is substantial justification for the proscription, just as it does in free-speech cases.

Thus, the First Amendment's protection of free *speech* invalidates laws that happen to inhibit speech even though they are directed at some other activity (sound amplification,³ campaign contributions,⁴ litter-

¹ For a description of those requirements, *see, e.g.,* *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976).

² I refer here only to the First Amendment's guarantees of freedom of speech and press—not to other guarantees, such as freedom of religion or the right of personal autonomy or privacy which some cases have rested in part upon the First Amendment. *See, e.g.,* *Stanley v. Georgia*, 394 U.S. 557, 564 (1969); *Griswold v. Connecticut*, 381 U.S. 479, 482-83 (1965).

³ *See* *Saia v. New York*, 334 U.S. 558, 561 (1948) ("Loudspeakers are today indispensable instruments of effective public speech").

⁴ *See* *Buckley v. Valeo*, 424 U.S. 1, 16 (1976):

We cannot share the view that the present Act's contribution and expenditure limitations are comparable to

ing⁵). The more limited guarantee of freedom of expression, by contrast, does not apply to accidental intrusion upon expressiveness but only to purposeful restraint of expression. It would not invalidate a law generally prohibiting the extension of limbs from the windows of moving vehicles; it would invalidate a law prohibiting only the extension of clenched fists.

I believe the foregoing analysis is consistent with all of the Supreme Court's holdings in this field. I would be content to consign marching and picketing, as the principal dissent suggests, to a category of traditionally expressive conduct which itself qualifies as speech, and thus does not require a showing of expression-suppressing intent. I do not think that exception is necessary, however, to explain the cases. The marching and picketing holdings represent not conduct protected because it is in itself expressive, but rather what the cases and commentators call "speech-

the restrictions on conduct upheld in *O'Brien*. The expenditure of money simply cannot be equated with such conduct as destruction of a draft card. Some forms of communication made possible by the giving and spending of money involve speech alone, some involve conduct primarily, and some involve a combination of the two. Yet this Court has never suggested that the dependence of a communication on the expenditure of money operates itself to introduce a nonspeech element or to reduce the exacting scrutiny required by the First Amendment.

⁵ See *Schneider v. State*, 308 U.S. 147, 163 (1939):

It is argued that the circumstance that in the actual enforcement of the Milwaukee ordinance the distributor is arrested only if those who receive the literature throw it in the streets, renders it valid. But, even as thus construed, the ordinance cannot be enforced without unconstitutionally abridging the liberty of free speech. As we have pointed out, the public convenience in respect of cleanliness of the streets does not justify an exertion of the police power which invades the free communication of information and opinion secured by the Constitution.

plus"⁶—conduct “intertwined”⁷ or “intermingled”⁸ *with speech*. The union organizer, for example, cannot convey his spoken or written message to the relevant audience if he is not allowed to be present at the entrance to the employer’s place of business. Those cases differ only in degree from the sound-amplification, campaign-contribution and littering cases referred to above: They deal with laws which, by prohibiting an essential concomitant of effective speech, infringe upon speech itself, and thus call forth the full First Amendment standard of justification.⁹ (It may be difficult to determine what particular conduct beyond the physical presence involved in the marching and picketing cases, or the distribution of literature involved

⁶ See *American Radio Ass’n v. Mobile Steamship Ass’n*, 419 U.S. 215, 231 (1974); W. LOCKHART, Y. KAMISAR, & J. CHOPER, *CONSTITUTIONAL LAW* 1136 (1980).

⁷ See, e.g., *Cameron v. Johnson*, 390 U.S. 611, 617 (1968); *Cox v. Louisiana*, 379 U.S. 559, 563 (1965).

⁸ See, e.g., *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308, 313 (1968).

⁹ These cases would be compatible with the analysis I have set forth, even if they were to be regarded as involving not “speech-plus” but purely nonspeech expressive conduct. The picketing cases, for example, do not invalidate general prohibitions against walking back and forth, or against obstructing entrances, but rather banning such activities when engaged in for the (expressive) purpose of inducing people to refrain from trading or working. See, e.g., *Thornhill v. Alabama*, 310 U.S. 88, 91-92 (1940), where the statute forbade “[a]ny person . . . [to] go near to or loiter about the premises or place of business of any other person . . . for the purpose, or with the intent of influencing, or inducing other persons not to trade with, buy from, sell to, have business dealings with, or be employed by such persons” See also *Carlson v. California*, 310 U.S. 106 (1940). The marching cases typically turn upon the use of a vague ordinance for the very purpose of suppressing *only* expressive activity. See, e.g., *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 153 (1969); *Edwards v. South Carolina*, 372 U.S. 229, 236 (1963).

in the littering case, is constitutionally deemed an essential concomitant of effective speech; but I consider it self-evident that on-site sleeping is not.)

It is only such cases as *Stromberg v. California*, 283 U.S. 359 (1931) (flying of a red flag), *Brown v. Louisiana*, 383 U.S. 131 (1966) (silent sit-in), *United States v. O'Brien*, 391 U.S. 367 (1968) (burning of a draft card), *Tinker v. Des Moines School District*, 393 U.S. 503 (1969) (black arm-bands), and *Spence v. Washington*, 418 U.S. 405 (1974) (defacing the United States flag), that clearly present situations in which speech—that is, the spoken or written word—is not necessarily involved.¹⁰ The holdings

¹⁰ In my view, the nude entertainment holdings do not deal with mere expressive conduct. *Schad v. Borough of Mount Ephraim*, 452 U.S. 61 (1981), struck down the challenged ordinance on overbreadth grounds, since it included all live entertainment—including spoken entertainment. *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975), involved a prohibition not of nudity alone, but of the entire stage production "Hair" because it included nudity. It stands for the well-established principle that a spoken or written work which has "serious artistic value" cannot be banned simply because it includes matter which, in isolation, might be proscribable. In *California v. LaRue*, 409 U.S. 109, 118 (1972), the Court said that "at least some of the performances" covered by the regulation banning nudity and sexual acts "are within the limits of the constitutional protection of freedom of expression" (the case in any event upheld the regulation); and in *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 932 (1975), it said that the nude barroom dancing might be protected "under some circumstances." Both these cases may have had in mind only nudity in connection with a spoken or sung performance. In any case, I find it difficult to believe that exhibitory nudity will, on the ground that it is independently "communicative," be accorded greater constitutional protection than the nondemonstrative sort, such as nude bathing, see, e.g., *Chapin v. Town of Southampton*, 457 F. Supp. 1170 (E.D.N.Y. 1978). In other words, to the extent the nude entertainment cases speak to nudity apart from spoken or sung performances they seem to me based upon the "personal autonomy" rather than the "free speech" line of cases. See note 2, *supra*.

of all these cases support the analysis set forth above. Every proscription of expressive conduct struck down by the Supreme Court was aimed precisely at the communicative effect of the conduct. The only reason to ban the flying of a red flag (*Stromberg*) was the revolutionary sentiment that symbol expressed.¹¹ The only reason for applying the "breach of the peace" statute to the silent presence of black protestors in the library in *Brown* was the effect which the communicative content of that presence had upon onlookers.¹² The only reason for singling out black armbands for a dress proscription (*Tinker*) was precisely their expressive content, allegedly causing classroom disruption.¹³ The only reason to prevent the attachment of symbols to the United States flag (*Spence*) was related to the communicative content of the flag.¹⁴ In *O'Brien*, on the other hand, where the Supreme Court upheld a ban on the destruction of draft cards, the law was

¹¹ The statute in *Stromberg* forbade the flying of "a red flag, banner or badge . . . as a sign, symbol or emblem of opposition to organized government" 283 U.S. at 361.

¹² "The statute was deliberately and purposefully applied solely to terminate the reasonable, orderly, and limited exercise of the right to protest the unconstitutional segregation of a public facility." 383 U.S. at 142.

¹³ "The school officials banned and sought to punish petitioners for a silent, passive expression of opinion unaccompanied by any disorder or disturbance on the part of petitioners." 393 U.S. at 508.

¹⁴ "If [Washington's interest in preserving the national flag as an unalloyed symbol of our country] is valid, we note that it is directly related to expression in the context of activity like that undertaken by appellant. For that reason and because no other governmental interest unrelated to expression has been advanced or can be supported on this record, the four-step analysis of *United States v. O'Brien* . . . is inapplicable." 418 U.S. at 414 n.8 (citation omitted).

not directed against the communicative nature of that activity.¹⁵

I do not suggest that the dicta of all the expressive conduct cases, as opposed to their holdings, support the distinction set forth above. Some of the opinions merely label the conduct "expressive" and proceed at once to application of First Amendment standards. Only *O'Brien*, however, really raises the question (though leaves it unanswered)¹⁶ of what it is that avoids required application of those standards in every case. It is true that *O'Brien* appears to prescribe an inquiry, identical to that which I have described, as one of the four tests to be applied *after* it is determined that full First Amendment protections obtain. That would be inconsistent with my analysis if the *O'Brien* formulation were directed exclusively at "expressive conduct" cases—for a test triggered by the protection could hardly be the very test applied to determine whether the protection exists in the first place. In fact, however, the *O'Brien* discussion is directed at the tests to be applied in order to validate a statute impinging upon *any* activity protected by the First Amendment—not just expressive conduct, but also conduct "intertwined with speech," and indeed even religiously motivated or associational conduct.¹⁷ For most of these categories the test would *not* be duplicative; it is only the governmental

¹⁵ "[B]oth the governmental interest and the operation of the 1965 Amendment [banning draft card burning] are limited to the noncommunicative aspect of *O'Brien's* conduct." 391 U.S. at 381-82.

¹⁶ "We cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea. However, even on the assumption that the alleged communicative element in *O'Brien's* conduct is sufficient to bring into play the First Amendment, it does not necessarily follow that the destruction of a registration certificate is constitutionally protected activity." 391 U.S. at 376.

¹⁷ See the cases cited at 391 U.S. 376-77 n.22-27.

restriction of purely expressive conduct that escapes the necessity of First Amendment analysis if it is not aimed at repressing expression. This explanation is confirmed by the Supreme Court's later per curiam opinion in *Spence*, which, in the context of expressive conduct, describes the inquiry into expression-suppressing purpose—as I have—as a test *preliminary* to the application of *O'Brien's* four-step analysis.¹⁸

I find *O'Brien* supportive of my view since it shows the importance of statutory purpose in the Court's thinking. The distinction here proposed is described explicitly in the following passage:

The case at bar is therefore unlike one where the alleged governmental interest in regulating conduct arises in some measure because the communication allegedly integral to the conduct is itself thought to be harmful. In *Stromberg v. California*, 233 U.S. 359 (1931), for example, this Court struck down a statutory phrase which punished people who expressed their "opposition to organized government" by displaying "any flag, badge, banner, or device." Since the statute there was aimed at suppressing communication it could not be sustained as a regulation of non-communicative conduct.

391 U.S. at 382. To the same effect is the following statement in *Buckley v. Valeo*, 424 U.S. 1, 17 (1976):

Even if the categorization of the expenditure of money as conduct were accepted, the limitations challenged here would not meet the *O'Brien* test because the governmental interests advanced in support of the Act involve "suppressing communication." The interests served by the Act include restricting the voices of people and interest groups who have money to spend and reducing the overall scope of federal election campaigns. Although the Act does not focus on the ideas expressed by persons or groups subject to

¹⁸ See note 14, *supra*.

its regulations, it is aimed in part at equalizing the relative ability of all voters to affect electoral outcomes by placing a ceiling on expenditures for political expression by citizens and groups. Unlike *O'Brien*, where the Selective Service System's administrative interest in the preservation of draft cards was wholly unrelated to their use as a means of communication, it is beyond dispute that the interest in regulating the alleged "conduct" of giving or spending money "arises in some measure because the communication allegedly integral to conduct is itself thought to be harmful." 391 U.S. at 382.

The effect of the rule I think to be the law may be to permit the prohibition of some expressive conduct that might be desirable. Perhaps symbolic campsites¹⁹ or symbolic fire bases²⁰ are a good idea. But it is not the function of the Constitution to make such fine judgments; nor is it within the practical power of the courts to apply them. There is a gap between what the Constitution requires and what perfect governance might sometimes suggest, in the area of expression as in other fields. So long as the Park Service is held to even-handed application of its rules, I doubt that the political pressures generated in a representative democracy will tolerate the proscription of all expressive conduct, in Lafayette Park or anywhere else. The Park Service's judgment will not be distorted, however—nor its time and ours consumed—in the mistaken pursuit of a supposed constitutional answer.

Where expressive conduct unrelated to speech is at issue, I think it worthwhile to engage in the preliminary

¹⁹ See *Vietnam Veterans Against the War v. Morton*, 506 F.2d 53 (D.C. Cir. 1974) (per curiam).

²⁰ See Reply to Appellees' Opposition to Appellants' Emergency Motion for Injunction Pending Appeal and Opposition to Appellants' Motion for Summary Affirmance at 46 (Dec. 14, 1982) (description of Vietnam Veterans' May 1982 demonstration).

step of analysis that separates conduct-prohibiting from expression-prohibiting laws and exempts the former from rigorous First Amendment scrutiny. The government argued in the present case, with some justification, that the posture in which it now finds itself—prohibiting sleep, but permitting all of the external manifestations of sleeping, including tents—is attributable to its efforts to comply with the directives of this court relating to the special justification needed to prohibit expressive conduct. See *Women Strike for Peace v. Morton*, 472 F.2d 1273 (D.C. Cir. 1972). The Park Service has in effect been required to split each of its regulations into two: one that applies to people who are not engaging in the prohibited conduct for an expressive purpose, which can be enforced as written; the other that applies to demonstrators, which can be enforced only if supported by the substantial governmental interest that the First Amendment requires. That necessity may be unavoidable with regard to the relatively narrow range of conduct essential to effective speech. But to expand it to all conduct, even including sleep, seems to me unreasonable and unlikely to work. Park Service officers who have even less assurance of the proper application of the *O'Brien* four-part test than the various opinions of this court display will (against their sound administrative judgment) permit “symbolic” intrusions that need not be allowed; and the rule for demonstrators will inevitably (and perhaps rightly) tend to become the rule for the public at large—all with needlessly harmful effect upon the agreeability of our parks and public places. The unfortunate result is described by Justice Jackson’s statement in *Saia v. New York*, *supra*, 334 U.S. at 566, which I take the liberty of adapting to the facts of this case: “I dissent from this decision, which seems to me to endanger the great right of free speech by making it ridiculous and obnoxious, more than the Park Service regulation in question menaces free speech by proscribing sleep.”

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1982

No. 82-2445 & 82-2477

THE COMMUNITY FOR CREATIVE NON-VIOLENCE, ET AL.,
APPELLANTS

v.

JAMES G. WATT, SECRETARY OF THE INTERIOR, ET AL.

Civil Action No. 82-02501

Filed: March 9, 1983

Appeals from the United States District Court
for the District of Columbia

Before: Robinson, Chief Judge, Wright, Tamm, Mac-
Kinnon, Wilkey, Wald, Mikva, Edwards, Gins-
burg, Bork and Scalia, Circuit Judges

JUDGMENT

These causes came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and were argued by counsel. Thereafter, before a panel decision was announced, this Court, *sua sponte*, ordered that these cases be reheard by the full Court and such was done. On consideration of the foregoing, it is

ORDERED and ADJUDGED, by this Court, *en banc*, that the judgment of the District Court, on appeal herein, is reversed, and these cases are remanded to the District Court with instructions to enjoin appellees from prohibiting

sleeping by demonstrators in tents on sites authorized for appellants' demonstration, in accordance with the per curiam opinion of this Court filed herein this date.

Per Curiam
For the Court

/s/ GEORGE A. FISHER _____
GEORGE A. FISHER
CLERK

Date: MARCH 9, 1983.

Opinion for the Court Filed Per Curiam.

Separate opinion filed by Circuit Judge Mikva in which Circuit Judge Wald concurs, in support of a judgment reversing. Chief Judge Robinson and Circuit Judge Wright file a statement joining in the judgment and concurring in Circuit Judge Mikva's opinion with a caveat. Circuit Judge Edwards files an opinion joining in the judgment and concurring partially in Circuit Judge Mikva's opinion. Circuit Judge Ginsburg files an opinion joining in the judgment. Circuit Judge Wilkey files a dissenting opinion, in which Circuit Judges Tamm, MacKinnon, Bork and Scalia concur. Circuit Judge Scalia files a dissenting opinion, in which Circuit Judge MacKinnon and Bork concur.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1982

No. 82-2445

THE COMMUNITY FOR CREATIVE NON-VIOLENCE, ET AL.,
APPELLANTS

v.

JAMES G. WATT, SECRETARY OF THE INTERIOR, ET AL.
AND CONSOLIDATED CASE No. 82-2477

Civil Action No. 82-02501
Filed: March 15, 1983

BEFORE: Robinson, Chief Judge; Wright, Tamm, Mac-
Kinnon, Wilkey, Wald, Mikva, Edwards,
Ginsburg, Bork and Scalia, Circuit Judges

ORDER

Upon consideration of appellees' motion for stay of man-
date pending application to the Supreme Court for a writ of
certiorari, and appellants' opposition thereto, it is

ORDERED, by the Court, that appellees' aforesaid
motion for stay of mandate is denied and the Clerk is di-
rected to issue the mandate herein forthwith.

Per Curiam

FOR THE COURT:

/s/ GEORGE A. FISHER
GEORGE A. FISHER
CLERK

Circuit Judges Tamm, MacKinnon, Wilkey and Bork would
grant appellees' motion for stay of mandate.

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 82-2501
Filed: December 9, 1982

THE COMMUNITY FOR CREATIVE NON-VIOLENCE, ET AL.,
PLAINTIFFS,

v.

JAMES G. WATT, ET AL., DEFENDANTS.

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

Pursuant to Rule 52 of the Federal Rules of Civil Procedure, the Court enters the following Findings of Fact and Conclusions of Law. These findings and conclusions constitute the grounds for this Court's denial of plaintiffs' motion for a preliminary injunction in this case. That motion was argued before the Court on Friday, December 3, 1982 and at the conclusion of the hearing the Court entered an oral order denying the motion for a preliminary injunction. In addition, the parties have submitted cross-motions for summary judgment, which were also heard by the Court on December 3, 1982. Having concluded that there are no genuine issues of material fact, the Court also enters summary judgment in favor of defendants and against plaintiffs.

SUMMARY

Plaintiffs are seven individuals and an organization (the Community of Creative Non-Violence) who applied to the National Park Service to use Lafayette Park and the Mall to erect sixty tents as part of a demonstration commencing December 21, 1982 to call public attention to the plight of the homeless. On the basis of recently revised regulations, a permit was granted allowing plaintiffs to erect a symbolic tent city and conduct their demonstration as proposed, but plaintiffs were denied permission to carry on camping activities in the two park areas.

Plaintiffs filed this action on September 7, 1982 challenging the partial denial of their permit application as violative of their First and Fifth Amendment rights. Cross-motions for summary judgment were filed on October 7 and 29, 1982 and plaintiffs also moved for a preliminary injunction on November 12, 1982. Consideration of all motions was expedited by the Court, and at the conclusion of a consolidated hearing on all three motions on December 3, 1982, we indicated that the motion for a preliminary injunction would be denied and that summary judgment would be entered in favor of defendants and against plaintiffs.

In brief, we conclude that a preliminary injunction should not issue primarily because plaintiffs have failed to establish a likelihood of success on the merits. The Department of Interior certainly can regulate national park areas for the benefit of all the public, has the authority to issue regulations for that purpose, and has properly issued the amended regulations at issue here. Those regulations describe the prohibited activities precisely and do not reach protected constitutional rights or conduct, and thus withstand all of plaintiffs' constitutional challenges. Perhaps most importantly, even if in some context sleeping is entitled to constitutional protection, the regulations in this case, by their definition of camping, are content-neutral and therefore do not violate the First Amendment. Moreover, the record establishes a fair and uniform enforcement of those regulations. For these same reasons, we grant summary judgment in favor of defendants on the basis of the uncontroverted facts of the record before the Court.

FINDINGS OF FACT

1. Plaintiffs applied to the National Capital Region of the National Park Service, in an undated application, for a permit to demonstrate in Lafayette Park and on the Mall beginning on December 21, 1982. A letter attached to the application indicated that plaintiffs desired to erect twenty tents in Lafayette Park and forty tents on the Mall. Plaintiffs indicated that the tents would symbolize the plight of the poor and homeless. Exhibit A to Defendants' Memorandum

dum in Support of their Motion for Summary Judgment (hereinafter Defs' Memorandum).

2. Plaintiffs indicated in their application letter that one hundred and fifty demonstration participants would be sleeping in the tents. Although plaintiffs' letter initially indicated that food would not be served at the campsite, the letter later contradicted this disclaimer by stating "[w]ithout the incentive of sleeping space or a *hot meal*, the homeless would not come to the site." (emphasis supplied). Ex. A to Defs' Memorandum, at 2 & 3.

3. Plaintiffs' application stated that their proposed demonstration "does not differ" from the similar demonstration held by plaintiffs during the winter of 1981-82. Ex. A. to Defs' Memorandum.

4. On July 9, 1982, defendants responded to plaintiffs' application in a letter which granted plaintiffs a permit to erect a symbolic city to emphasize the plight of the poor and homeless. Plaintiffs however, were denied permission to carry on camping activities in the two park areas pursuant to the National Park Service regulations governing camping and the erection of temporary structures in the National Capital region. Ex. B. to Defs' Memorandum.

5. In light of the revised regulations on camping and temporary structures, defendants determined that plaintiffs' intention to have over one hundred demonstrators sleep overnight in tents would be violative of federal regulations and, thus, was an activity that could not be permitted.

6. Specifically, plaintiffs' application was approved by the National Park Service except that the "portion of [plaintiffs'] activities concerning the use of park lands for the living accommodation purposes of demonstration participants" was not approved under the regulations, on the express ground that plaintiffs' application and supporting materials indicated an intent to house over one hundred people on national park lands not designated as public campgrounds over an extended period of time, including provisions for sleeping, and that those activities constitute camping or using park lands for living accommodation purposes

which is prohibited under the regulations. Ex. B. to Defs' Memorandum.

7. At no time in any papers submitted to the National Park Service or this court have plaintiffs denied that their demonstration will include sleeping, making preparations to sleep (including the laying down of bedding materials for the purpose of sleeping), and storing their personal belongings. Ex. A to Defs' Memorandum.

8. The camping regulations of the National Capital Region were revised earlier this year through a formal rule-making and became effective June 4, 1982. 47 Fed. Reg. 24,299-306 (1982) (to be codified at 36 C.F.R. §§ 50.19 and 50.27). The revisions followed the decision of the Court of Appeals for this Circuit in *Community for Creative Non-Violence v. Watt*, 670 F.2d 1213 (D.C. Cir. 1982).

9. The June 4, 1982 revisions clarified the definition of the term "camping" as used in 36 C.F.R. § 50.27, which prohibits camping in park areas not designated as public campgrounds. The revisions also clarified in section 50.19 the prohibition on the use of temporary structures in connection with permitted demonstrations and special events.

10. As revised, 36 C.F.R. § 50.27(a) prohibits camping in park areas not designated as public camping grounds, and defines the term as follows:

Camping is defined as the use of park land for living accommodation purposes such as sleeping activities, or making preparations to sleep (including the laying down of bedding for the purpose of sleeping), or storing personal belongings, or making any fire, or using any tents or shelter or other structure or vehicle for sleeping or doing any digging or earth breaking or carrying on cooking activities. The above-listed activities constitute camping when it reasonably appears, in light of all the circumstances, that the participants, in conducting these activities, are in fact using the area as a living accommodation regardless of the intent of the participants or the nature of any other activities in which they may also be engaging.

11. Section 50.19(e)(8), as amended, prohibits the use of temporary structures for camping outside the designated camping areas for

living accommodation activities such as sleeping, or making preparations to sleep (including the laying down of bedding for the purpose of sleeping), or storing personal belongings, or making any fire, or doing any digging or earth breaking or carrying on cooking activities. The above-listed activities constitute camping when it reasonably appears, in light of all the circumstances, that the participants, in conducting these activities, are in fact using the area as a living accommodation regardless of the intent of the participants or the nature of any other activities in which they may also be engaging.

47 Fed. Reg. at 24,305.

12. These prohibitions represent the policy and practice of the National Park Service as to camping and temporary structures. It is the view of the Park Service, as reflected in the preamble to the revisions to the regulations, that the parks in the Memorial core area (the Mall, Washington Monument grounds, White House area, Ellipse, Lafayette Park, East and West Potomac Park, the Jefferson and Lincoln Memorials and the Kennedy Center) are unsuited for camping activities. Camping by any group in these areas would deprive other groups of the right to use nationally significant space. Camping in an area not suited for such activity could cause significant damage to park resources. The cumulative impact of camping activities in the Memorial core areas would be a substantial increase in costs for park restoration, sanitary facilities and extra park personnel, including law enforcement personnel. In addition, allowing camping in connection with one type of activity, such as the demonstration in which plaintiffs wish to engage, would, in the view of the Park Service, amount to a federal subsidy of the living costs of demonstrating park visitors and would create pressure from other visitors for similar accommodations. Administrative Policy Statements, 47 Fed. Reg. at 24,302, 24,304-05.

13. We find that during plaintiffs' demonstration in the winter of 1981-82, to which they have referred as a model

for their proposed demonstration, participants used tents for living accommodation purposes, including sleeping, the building of a living surface and the laying down of bedding materials for sleeping, and the storage of personal goods and belongings (including furnishings) at the demonstration site. Aff. of Lt. Gary E. Treon, U.S. Park Police, filed Nov. 30, 1982; Aff. of Dep. Chief James C. Lindsey, U.S. Park Police, ¶¶ 2-3 and exs. (Ex. A. to Defendants Memorandum in Reply to Plaintiffs' Opposition to Plaintiffs' Motion for a Preliminary Injunction (hereinafter Defs' Reply Memorandum)).

14. The evidence offered by plaintiffs only goes to how frequently during the 1981-82 demonstration they engaged in such activities as hanging blankets on tree branches in Lafayette Park and consuming food at their demonstration site, all of which activities they admit occurred on occasion. Affs. attached to plaintiffs' Notice of Filing submitted Dec. 1, 1982.

15. On June 4, 1982, the date that the revised regulations became effective, notices were posted on a campsite on the Ellipse informing campers about the revised regulations and warning them that they would face arrest if they did not cease their activities. The notice was repeated the next day, and the campers voluntarily left the site. Ex. D. to Defs' Memorandum.

16. In connection with a proposed demonstration beginning June 23, 1982, the Park Service notified the Southern Christian Leadership Conference (SCLC) on June 9, 1982 that the revised regulations prohibited camping and the use of temporary structures for living accommodation purposes. The SCLC, which had been planning to erect a campsite as a living accommodation, chose instead not to do so, in compliance with the regulation. Ex. E to Defs' Memorandum.

17. We find that in every demonstration subject to the revised regulations alleged by plaintiffs to show arbitrary or discriminatory enforcement of the regulations, the Park Service specifically denied the requestor permission to camp in park areas not designated as public campgrounds,

and enforced the regulations against demonstration participants in an even-handed and reasonable manner.

18. The Association of Community Organizations for Reform Now (ACORN) was granted a permit on June 18, 1982 to engage in a demonstration concerning the plight of a homeless on the Ellipse from June 23, 1982 to June 25, 1982. ACORN was specifically informed that they could not engage in proposed camping activities pursuant to the revised regulations. The Park Service expressly denied ACORN permission to have approximately 200 demonstrators housed overnight in fifty tents. Ex. G to Defs' Memorandum. During the first night of the ACORN demonstration, the Park Police determined that the demonstrators were possibly in violation of the regulations prohibiting camping. The Park Police and ACORN representatives engaged in extensive negotiations resulting in demonstration participants taking actions that brought the demonstration into compliance with the regulations. Ex. A to Defs' Reply Memorandum.

19. On the following evening, similar problems arose and at 4:30 a.m. the Deputy Chief of the Park Service revoked the ACORN permit for non-compliance with the regulations and the conditions of the permit when approximately 165 demonstrators were observed to be sleeping in the tents. All demonstrators left the site within a few hours, and no arrests were made because of insufficient Park Police manpower at the site and assurances that the group would promptly depart. Ex. A to Defs' Reply Memorandum; Ex. G to Defs' Memorandum.

20. A demonstration was held by the Vietnam Veterans Against the War (VVAW) on the Mall from May 12, 1982 through May 15, 1982. The Park Service determined that the proposed activities of the VVAW did not constitute camping under the regulations because no structures or shelters would be used, there would be no fires, breaking of ground, food service or preparation, or sanitary facilities, and because, although some participants might be asleep at times during the night, no bedding materials would be used and different participants would be awakened at two-hour intervals to stand symbolic guard duty. Ex. J to Defs'

Memorandum; Ex. G to Defs' Memorandum (distinguishing proposed ACORN activities from VVAW activity on the basis that VVAW activity was guerilla theatre involving neither shelters nor bedding materials, with certain participants awakened periodically to stand guard duty and act out speech activities).

21. The Park Police observed no violations of the camping regulations by the VVAW during their May 12-15, 1982 demonstration, and the only sleeping observed was done by participants on the ground with no bedding materials or shelter for short periods of time. Aff. of Lt. Treon (Ex. B to Defs' Reply Memorandum).

22. The Arab Women's Council was granted a permit on July 28, 1982 to conduct a demonstration in Lafayette Park from July 28, 1982 to August 3, 1982. The group was specifically informed of the camping regulations and that any activities constituting the use of park lands for living accommodation purposes would not be permitted. Ex. H to Defs' Memorandum.

23. The Park Police did not observe any Arab Women's Council demonstration participants sleeping at the site, or any other violations of federal regulations, and most demonstration participants left the site by 5:00 p.m. each day without any unusual incidents. Aff. of Sgt. Swerda (Ex. C to Defs' Reply Memorandum).

24. A permit was issued on September 8, 1982 to the Palestine Congress of North America for a demonstration from September 10 through September 12, 1982. The permit informed that group that camping, *i.e.*, the use of park lands for living accommodation purposes, was prohibited under federal regulations and would not be permitted. A small security patrol was authorized to remain on the site overnight because of valuable equipment being left there. Ex. I to Defs' Memorandum; Ex. B to Defs' Reply Memorandum.

25. The Park Police did not observe any participants of the Palestine Congress of North America demonstration sleeping on the site. No reports of sleeping at the site or violations of federal regulations by demonstration participants were received, and even with respect to the security

patrol which was permitted to remain overnight, members were not permitted to sleep and no violations of the camping regulations occurred. Exs. B & C to Defs' Reply Memorandum.

26. The regulations prohibiting camping have also been enforced against individual demonstrators. Ex. F to Defs' Memorandum. Such enforcement of the camping regulations has been upheld notwithstanding a constitutional challenge similar to that raised here by plaintiffs. See *United States v. Thomas*, Crim. No. 82-0329-M (D.D.C.); *United States v. Harris*, Crim. No. 82-0328 (D.D.C.).

CONCLUSIONS OF LAW

A. Preliminary Injunction Standards

1. We are a court of limited jurisdiction, and in asking us to exercise our equity powers by seeking extraordinary equitable relief in the nature of a preliminary injunction, it is plaintiffs' burden to make a showing which satisfies the criteria for such relief.

2. Those criteria, as set forth in *Virginia Petroleum Jobbers Association v. Federal Power Commission*, 259 F.2d 921 (D.C. Cir. 1958); *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841 (D.C. Cir. 1977), and other cases, required that plaintiffs demonstrate that:

- (1) they have a substantial likelihood of success on the merits;
- (2) without the requested injunction they will sustain irreparable injury;
- (3) the grant of an injunction will not substantially harm the interest of others including defendants; and
- (4) the public interest favors the granting of the injunction.

B. The Regulations are Not Vague or Overbroad

3. In analyzing enactments challenged for reasons of overbreadth or vagueness, a court must first determine whether the enactment reaches a *substantial* amount of constitutionally protected conduct; if it does not then the

overbreadth challenge fails. Moreover, if the enactment does not implicate constitutionally protected conduct, it must be upheld unless it is impermissively vague in all of its applications. *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 102 S. Ct. 1186, 1191 (1982).

4. When an enactment regulates conduct, as the instant regulations do, instead of speech itself, "overbreadth scrutiny has generally been somewhat less rigid" so long as the statute regulates the conduct in a "neutral, noncensorial manner." *Broadrick v. Oklahoma*, 413 U.S. 601, 613-15 (1973). Where conduct rather than speech is involved, "the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Id.*, at 615.

5. We conclude that the challenged regulations are not unconstitutionally overbroad because they do not reach a *substantial* amount, or indeed any amount, of constitutionally protected conduct. The regulations do not limit or interfere with any protected constitutional rights. They do not prevent the plaintiffs from demonstrating, from erecting a symbolic tent city, or even from having a wakeful vigil at the site; their only purpose is to avoid turning the park lands of the Memorial core area into a campsite for demonstrating groups.

6. Camping with necessarily attendant sleeping activities is inconsistent with normal activities in the Memorial core park areas as demonstrated by the structure of and policy expressed in the National Park Service regulations. We conclude, therefore, that the use of park lands for living accommodation purposes in non-designated areas is not a normal activity in those areas and is basically incompatible with the normal activity on the Mall and in Lafayette Park. *Grayned v. City of Rockford*, 408 U.S. 104, 116 (1972).

7. Enactments are void for vagueness if they do not give an individual fair notice of the prohibited conduct or they do not provide explicit standards for law enforcement officials, judges and juries. *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 102 S. Ct. at 1193 (quoting *Grayned v. City of Rockford*, 408 U.S. at 108).

8. A regulation is void for vagueness if its prohibitions are not clearly defined, but no more than a reasonable degree of certainty is required and the regulation need not eliminate all police discretion. *Grayned v. City of Rockford*, 408 U.S. at 108, 114; *Boyce Motor Lines, Inc. v. United States*, 342 U.S. 337, 340 (1952).

9. We conclude that the challenged regulations are not unconstitutionally vague. They describe precisely the activity prohibited to give proper notice of the prohibition. The regulations adequately define the term "camping," specifying examples of activities that constitute camping when it reasonably appears under the circumstances that the participants in those activities are using the area for living accommodation purposes. Reasonably explicit standards are provided to enable law enforcement officials to apply the regulations.

10. We conclude that the Court of Appeals in *Vietnam Veterans Against the War [VVAW] v. Morton*, 506 F.2d 53 (D.C.Cir. 1974) (per curiam), has already determined that a regulation prohibiting camping, as defined in the current regulations, in these national park areas is not unconstitutionally vague. 506 F.2d at 56 n.9, 59. We are compelled to follow that decision.

C. The Regulations Prohibit Plaintiffs' Proposed Conduct

11. We conclude that under the revised regulations the intent of the participants or the nature of other activities in which they may also be engaging is not determinative of whether they are engaging in activities which constitute the use of park areas for living accommodation purposes. See 47 Fed.Reg. at 24,302, 24,305. Rather, the regulations prohibit camping in non-designated areas, if under the circumstances, it reasonably appears that the area is used or to be used for living accommodation purposes. *Id.*

12. We conclude the plaintiffs' application, which stresses the necessity for providing sleeping accommodations in order to attract homeless persons to the demonstration site, establishes that plaintiffs intend to have sleeping activities as part of their demonstration in order to provide an over-

night living accommodation for demonstration participants, in violation of the camping regulations.

13. Plaintiffs have specifically referred to their demonstration last winter as a model for their proposed demonstration. The activities in which they engaged during that previous demonstration were permitted under the camping regulations then in effect as interpreted by the Court of Appeals in *Community for Creative Non-Violence v. Watt*, 670 F.2d 1213 (D.C.Cir. 1982). We conclude that those same activities, in which plaintiffs admittedly propose to engage, are not permissible under any reasonable and neutral interpretation of the present regulations prohibiting camping.

D. The Regulations as Applied to Plaintiffs' Proposed Conduct Do Not Impermissibly Infringe on Any Rights to Free Speech Protected by the First Amendment

14. We conclude that the act of sleeping in the present context does not express a constitutionally protected message because it is not "sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth amendments." *Spence v. Washington*, 418 U.S. 405, 409 (1974) (per curiam). As the Supreme Court stated in *United States v. O'Brien*, 391 U.S. 367, 376 (1968), "[w]e cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea."

15. The Court of Appeals has indicated that if a regulation is properly promulgated and even-handedly enforced, "[i]t may well be that such across-the-board ban on sleeping outside official campgrounds would be constitutionally acceptable." *United States v. Abney*, 534 F.2d 984, 986 (D.C.Cir. 1976); see also *Abney v. United States*, No. 79-561 (D.C.App., Sept. 22, 1982). We conclude that the Department of Interior has the jurisdiction to regulate the use of park lands for the benefit of all people, that in pursuance of this jurisdiction the Park Service has the authority to issue regulations and that, as a procedural matter, the amended regulations of June 4, 1982 were duly promulgated. Moreover, for the reasons indicated below, we conclude that the regulations have been fairly and even-

handedly enforced. Therefore, we conclude that the across-the-board ban on camping outside official campgrounds in the regulations is constitutional.

16. We conclude that this result is consistent with, and indeed compelled by, the Supreme Court decision in *Quaker Action Group v. Morton*, 402 U.S. 926 (1971), and the Court of Appeals decision in *VVAW v. Morton*, 506 F.2d 53. In *Quaker Action*, the Supreme Court confirmed that the government is not required to provide sleeping accommodations for demonstrators when it upheld an injunction issued by this district court forbidding the Vietnam Veterans Against the War from camping overnight on the Mall. In *VVAW v. Morton*, the Court of Appeals then relied upon that decision in concluding that camping overnight has no relevance to freedom of speech. The Court stated:

By its order of June 21, 1971, reinstating (after a reversal by this Court) District Judge Hart's injunction forbidding the VVAW from camping on the same part of the Mall, the Supreme Court accepted the finding of Judge Hart that overnight camping was not activity within the purview of the First Amendment and that the blanket ban on camping in nondesignated areas was a reasonable exercise of supervisory authority over the public parkland. We are bound by that determination.

506 F.2d at 56. The Court then went on to find that:

Even considering the issue as an original proposition, without the benefit of Judge Hart's findings and the Supreme Court's approval in 1971, all of the District Court's discussion of free speech this year fails to convince us that there is any connection between freedom of speech and what appellants were forbidden to do by the United States Park Service regulations, camp overnight in the public park—in contradistinction to their exercise of free speech rights by usual modes during the day, which the appellees were specifically permitted to do. Camping overnight in a public park has no more relevance to free speech than say, digging latrines in a public park, and we think that the United States Park Service may regulate both.

Id., at 58.

17. We conclude that these cases supply clear precedent and support for the regulations at issue here as applied to plaintiffs. The right of the government to control public property for lawful nondiscriminatory purposes can no longer be questioned, *see, e.g., Adderly v. Florida*, 385 U.S. 39, 47-48 (1966), and the validity of specific narrowly-drawn regulations limiting camping and sleeping in national park areas to designated campsites is beyond peradventure.

18. The government has the authority to set reasonable restriction on First Amendment activities. Even assuming that the sleeping activities in which plaintiffs intend to engage are protected in some way under the First Amendment, we conclude that the regulations impose a reasonable limitation of the exercise of that conduct, and are the type of time, place and manner regulations upheld under the analysis set forth in *United States v. O'Brien*, 391 U.S. 367, 377 (1968).

19. We conclude that the regulations are content-neutral; in prohibiting the use of certain park areas for living accommodation purposes, they do so in the neutral manner and apply to everyone. The regulations do not permit sleeping or other camping activities which express certain messages while prohibiting those activities when they express other messages; the prohibition on camping activities does not distinguish among messages. All sleeping, if it manifests under all the circumstances the use of the park area as a living accommodation, is flatly prohibited.

20. In *O'Brien*, the Supreme Court found that a government regulation would be sufficiently justified:

if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

391 U.S. at 377.

21. We conclude that the instant regulations satisfy the *O'Brien* test. First, we conclude that the Government has

the constitutional authority to regulate the use of national park lands. See *Hague v. CIO*, 307 U.S. 496, 515-16 (1939).

22. We also conclude that the regulations serve a substantial governmental interest. Camping in the Memorial core "would deprive other park visitors including demonstrating park visitors, . . . of use of this nationally significant space." Administrative Policy Statements, 47 Fed. Reg. at 24,302, 24,305. Park resources would be seriously damaged, sanitation problems would be created, and law enforcement resources would be taxed. *Id.* Even if we viewed the use of park areas for living accommodation purposes as a form of expression, "[t]he privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all *Hague v. CIO*, 307 U.S. at 515-16.

23. We conclude that the regulations also satisfy the third portion of the *O'Brien* test. The governmental interest in promulgating the regulations is unrelated to the suppression of free expression. The governmental interest is to protect the park grounds for the benefit of all persons. The regulations do not suppress free expression; only the use of the land for living accommodation purposes is prohibited. In addition, the regulations do not prohibit the use of tents and similar structures to provide support or logistical services to demonstrators, and they do not prohibit the symbolic use of tents or other structures as a means by which a group can convey its message.

24. Finally, we conclude that the regulations satisfy the fourth requirement under *O'Brien* in that the incidental restriction on speech is no greater than necessary. The Park Service permits symbolic displays that would allow expression of plaintiffs' message. Such symbolic displays can effectively communicate the message without taxing the park area to the same extent as does actual use of the park land as a living accommodation. Plaintiffs have been permitted to erect their tents and can maintain a constant presence at their demonstration site. They are only prohibited from using the park area for living accommodation purposes.

25. Plaintiffs contend, in effect, that they are entitled to employ what they feel is the best method to communicate

their message. They argue that there are no sufficient alternative avenues of communication for their message, and that effective communication of their message can best be accomplished if they are permitted to demonstrate in precisely the manner they seek at Lafayette Park and on the Mall. The focus of the reasonable time, place and manner restrictions under *O'Brien*, as specifically approved by this Circuit, however, is that the government is not compelled under the First Amendment to permit the most effective means of expression chosen by a citizen. See *VVAW v. Morton*, 506 F.2d at 58 n. 14 (citations omitted). We conclude that the substantial government interest as set forth in the regulations is sufficient to justify any incidental impact on First Amendment activities resulting from a content-neutral, narrowly-drawn and reasonable prohibition against sleeping or other activities constituting camping in national park areas not designated for public camping.

E. The Regulations Have Been Fairly and Uniformly Enforced

26. A flexible compromise in enforcement based on emergency or other circumstances does not violate either freedom of speech under the First Amendment or equal protection under the Fifth Amendment. Neither the First nor the Fifth Amendment requires in every case the arrest and prosecution of those who violate regulations. See *VVAW v. Morton*, 506 F.2d at 59; *Cook v. City of Price*, 566 F.2d 699, 701 (10th Cir. 1977). In *VVAW v. Morton*, the court considered a challenge to the then-existing camping regulations based in part on a list of occasions on which the Park Service purportedly had allowed camping. The court firmly rejected that argument:

Far from constituting an unconstructional preference for favored groups, the Government action in those cases was merely a flexible compromise in the face of potential disruption of the public peace. Such emergency action does not create an entitlement in other groups to a similar variance from the usual prohibition. On the contrary, solicitude for the rights of every citizen to the even-handed enforcement of the law compels the maintenance of the absolute ban inviolate,

subject only to discretionary exceptions in the interest of public safety.

506 F.2d at 59.

27. Some of the examples of alleged discriminatory enforcement cited by plaintiffs, for instance the Resurrection City in 1968, were specifically rejected by the court in *VVAW v. Morton*. Others occurred prior to the application of the present regulations, and are therefore of little relevance here.

28. We conclude, as reflected in Findings of Fact Nos. 15-26, *supra*, that since the effective date of the revised regulations the Park Service has not authorized any camping in violation of the regulations, and is not aware of any use of park lands for living accommodation purposes in violation of the regulations.

29. We conclude that the regulations were fairly applied and enforced in a non-discriminatory manner in connection with all the demonstrations cited by plaintiffs as examples of discriminatory enforcement. Plaintiffs' affidavits do not draw the facts underlying this conclusion into genuine issue. The existence of possible undiscovered violations of the law is not the material issue here. Rather, the issue is whether or not there existed a policy or practice by the Park Service of permitting activities by other persons in violation of the regulations. Since plaintiffs' evidence only goes to the former proposition, not the latter, it fails to establish a policy of discriminatory enforcement.

30. The demonstration by the Vietnam Veterans Against the War in May, 1982 did not involve camping, the use of bedding materials or the storage of any personal belongings, and was permitted by defendants even though it included incidental sleeping. We conclude that defendants' determination that the VVAW demonstration was not prohibited as camping under the circumstances was a reasonable application of the regulations. Plaintiffs' proposed sleeping, in contrast, is clearly for living accommodation purposes and thus violative of the regulations. A two-day demonstration including incidental sleeping by a few demonstrators for short periods of time, without erecting tents to sleep in or using any bedding materials or storing any

personal belongings, can not be compared with plaintiffs' proposed four-month encampment with an estimated 150 participants sleeping each night in tents erected specifically for that purpose.

31. We also conclude that plaintiffs are mistaken in contending that defendants are discriminatorily enforcing the regulations because some persons may sleep in park areas on isolated occasions. The case of an individual falling asleep on a park bench or the grass for a short period, during lunch for instance, might well not constitute "camping" under the regulations since it might not be sleeping or other activities which amount to using the area as a living accommodation under the particular circumstances. Moreover, the Park Service cannot reasonably be expected to monitor and enforce the regulations against all individuals who may on occasion sleep in the parks for short periods, and the existence of a few unprosecuted minor violations of the regulations does not necessarily draw into question the fairness and uniformity of defendants' enforcement policy.

32. We therefore conclude that there has been no equal protection violation and that the law has been uniformly enforced. If there have been some minor or incidental violations which have not been prosecuted or stopped we conclude that those have been inadvertent; wherever the Park Service was aware of such violations, they have either cancelled the permit or taken other steps to bring persons into line with the regulations.

F. Plaintiffs Are Not Entitled to a Preliminary Injunction

33. We conclude that plaintiffs' motion for a preliminary injunction must be denied primarily on the basis that plaintiffs have not satisfactorily established a substantial likelihood of success on the merits of their claims, for the reasons stated in Conclusions of Law Nos. 3-32, *supra*. Even if the factual materials submitted by plaintiffs could be said to raise any question as to whether the regulations have been discriminatorily enforced, which we conclude they do not, it is clear that plaintiffs have not met their burden of demonstrating that they are ultimately likely to succeed in dem-

onstrating that their First or Fifth Amendment rights have been violated by defendants.

34. If we were to reach the other criteria for the issuance of a preliminary injunction, we would also conclude that the balance of harms under those three criteria does not favor the issuance of an injunction.¹ The only irreparable harm proffered by plaintiffs concerns their ability to prepare for their demonstration, and is not related directly to the expression of their message at the demonstration itself. Their proposed demonstration will not even commence until December 21, 1982. Whatever period of time it might take this court or the Court of Appeals finally to decide the merits of this case, we conclude that plaintiffs' constitutional rights will not be significantly harmed during that period, even if their demonstration (which is proposed to last all winter) must commence for a short time without provision for sleeping activities. Moreover, all that a preliminary injunction at this time could do would be to enjoin defendants from enforcing the regulations against plaintiffs pending resolution of this case on the merits. The uncertainty of the legality of their proposed demonstration, to which plaintiffs refer as the source of their alleged irreparable harm, would remain. We therefore conclude that the irreparable harm alleged by the plaintiffs is insufficient to justify the extraordinary relief of a preliminary injunction.

35. We note that plaintiffs must bear some responsibility for the alleged emergency nature of the question of their entitlement to a preliminary injunction. Their permit was denied in part on July 9, 1982. They filed their complaint two months later on September 7, 1982, after failing in an effort to reopen an earlier case; their motion for summary judgment was not filed until one month later on October 7, 1982; and they did not file their motion for a preliminary injunction until November 12, 1982, more than another

¹ Our assessment of the balance of harms and equities in Conclusions of Law Nos. 34-36 is particularly relevant to, and strongly supports, our denial of plaintiffs' Motion for Injunction Pending Appeal, which was filed at the conclusion of the hearing on December 3, 1982 and denied orally at that time.

month later. The equities of this situation therefore do not favor plaintiffs.

36. We also conclude that the public interest and the interest of defendants in administering the national park areas outweigh any interests invoked by plaintiffs in support of their motion for a preliminary injunction. Those public interests are set forth in the policy statements accompanying the challenged regulations. See 47 Fed. Red. at 24,301, 24,304. We conclude that enjoining the fair and reasonable enforcement of the camping regulations would be harmful to those public interests.

G. Defendants are Entitled to the Entry of A Summary Judgment

37. At oral argument, counsel for plaintiffs conceded that the only question on which they contend there are genuine issues of material fact relates to their allegation of discriminatory enforcement of the regulations. We conclude that on the record before us there are no genuine issues of material fact and defendants are entitled to judgment as a matter of law pursuant to Fed.R.Civ.P. 56.

38. With respect to the question of discriminatory enforcement of the regulations, we conclude for the reasons already stated that the record demonstrates a reasonable and even-handed enforcement of the law under all the circumstances. At most, the factual materials submitted by plaintiffs may raise a question whether minor and occasional violations of the regulations may have occurred unbeknownst to defendants and law enforcement officials. In light of the evidence submitted by both sides, we conclude that as a matter of law such inadvertent allowance of possible violations of the regulations would not be sufficient to raise a genuine issue as to the fair and nondiscriminatory enforcement of those regulations.

39. Accordingly, we conclude that for the reasons stated in the foregoing Conclusions of Law, summary judgment must be granted in favor of defendants and against plaintiffs.

111a

An order consistent with the foregoing has been entered
this day.

/s/ J. H. PRATT

JOHN H. PRATT

United States District Judge

DECEMBER 9, 1982.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 82-2501

Filed: December 9, 1982

THE COMMUNITY FOR CREATIVE NON-VIOLENCE, *et al.*,
PLAINTIFFS,

v.

JAMES G. WATT, *et al.*, DEFENDANTS.

ORDER

Consistent with the Findings of Fact and Conclusions of Law entered herein on this date, it is by the Court this 9th day of December, 1982,

ORDERED that plaintiffs' motion for a preliminary injunction be and by the hereby is denied, and it is

ORDERED that plaintiffs' motion for summary judgment be and the same hereby is denied, and it is

ORDERED that defendants' motion for summary judgment be and the same hereby is granted, and it is

FURTHER ORDERED that judgment be and the same hereby is entered in favor of defendants and against plaintiffs, and this action is dismissed in its entirety as to all defendants.

/s/ J. H. PRATT

JOHN H. PRATT

United States District Judge

No. 82-1998

Supreme Court, U.S.
FILED

DEC 8 1983

ALEXANDER L. STEVAS
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1983

JAMES G. WATT,
SECRETARY OF THE INTERIOR, ET AL., PETITIONERS

v.

THE COMMUNITY FOR CREATIVE NON-VIOLENCE, ET AL.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

JOINT APPENDIX

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217
Counsel for Petitioners

LAURA MACKLIN
Institute for Public
Representation
600 New Jersey Avenue, N.W.
Washington, D.C. 20001
(202) 624-8390
Counsel for Respondents

PETITION FOR WRIT OF CERTIORARI
FILED JUNE 7, 1983
CERTIORARI GRANTED OCTOBER 3, 1983

INDEX*

	Page
1. District Court Docket Entries	1
2. Court of Appeals Docket Entries	4
3. CCNV's Application for a Permit to Demonstrate in Lafayette Park and on the Mall for the winter of 1982-83 (Undated), with Attachment (Exhibit A)	9
4. Park Service Letter, Dated July 9, 1982, Grant- ing a Permit to CCNV for a December 1982 Demonstration in Lafayette Park and on the Mall (Exhibit B)	16
5. Order Granting Certiorari	18

*The opinions of the court of appeals and the district court appear in the appendix to the petition for a writ of certiorari and have not been reproduced.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[DOCKET ENTRIES]

DATE	NR.	PROCEEDINGS
1982		
Sep 7	1	COMPLAINT; appearance; exhibits A, B1-B2, C.
Sep 7	2	MOTION by plttfs. for leave to proceed in forma pauperis; memorandum of points and authorities in support; declarations of Mitch Snyder, Mary Ellen Hombs, Harold Moss, Clarence West, Monroe Kylandezes, Fred Randall and Mike Scott.
Sep 7		LEAVE to file without prepayment of costs granted. (FIAT) (Signed 9/3/82) HART, J.
Sep 7		SUMMONS (4) issued.
Sep 13	3	CASE reassigned from Judge Pratt to Judge Richey.
Sep 16	4	AFFIDAVIT of service of summons and complaint upon U.S. Attorney and deft. Watt on 9/7/82, and upon deft. Fish on 9/8/82.
Oct 7	5	MOTION by plttf. for summary judgment; statement of material facts; memorandum of points and authorities in support; table of contents; table of authorities; attachment; table of exhibits; exhibits 1a-1d, 2a-2c, 3a-3d, 4a-4b; table of declarations; declarations of Clarence West, Anthony Primus, James Wilson, Mitch Snyder, Mary Ellen Hombs, Harold Moss, Madeleine Adamson, Barbara Gamarekian, Carol Fennelly and Richard Miller.
Oct 15	6	CASE reassigned from Judge Richey to Judge Pratt.
Oct 18	7	MOTION of defts. for enlargement of time and memorandum of P&A's in support.

- Oct 20 8 OPPOSITION by pltffs. to defts' request for a ten-day extension.
- Oct 21 9 REQUEST by pltffs. for an oral hearing.
- Oct 21 10 MOTION by pltffs. for leave to file a supplemental declaration and memorandum of points and authorities in support thereof; exhibit (declaration).
- Oct 26 11 ORDER filed 10/22/82 allowing defts. to respond to pltffs' motion for summary judgment by 10/28/82. (N) PRATT, J.
- Oct 29 12 MOTION by defts. for summary judgment; statement of material facts; exhibits A-J.
- Nov 9 13 MEMORANDUM by pltfs. of Points and Authorities in opposition to defts.' motion for summary judgment and in reply to defts.' opposition to pltffs.' motion for summary judgment; Exhibits 5 & 6; Statement of Genuine Issues.
- Nov 10 14 ANSWER of deft. to complaint.
- Nov 10 CALENDARED. CD/N
- Nov 12 15 MOTION by pltffs. for preliminary injunction; memorandum of points and authorities in support; exhibit A; second declarations of Mitch Snyder and Harold Moss.
- Nov 12 16 MOTION by pltffs. for scheduling of hearing and status call and to shorten time for defts' response to motion for preliminary injunction; memorandum of points and authorities in support.
- Nov 22 17 REPLY by defts. to pltffs' opposition to defts' motion for summary judgment and in opposition to pltffs' motion for a preliminary injunction; exhibits A-C.
- Nov 23 18 ERRATA by defts.
- Dec 1 19 NOTICE by pltffs. of filing declarations; attachment.

- Dec 3 MOTION of plttf. for preliminary injunction, heard and denied; cross-motion for summary judgment heard and defts' motion granted; motion of plttf. for injunction pending appeal heard and denied. (Rep: V. Marshall) PRATT, J.
- Dec 3 20 MOTION of plttf. for injunction pending appeal denied. (FIAT) (N) PRATT, J.
- Dec 3 21 NOTICE of appeal by plttfs. from denial of 12/3/82; in forma pauperis—no fee; copy sent to John D. Bates.
- Dec 3 COPIES of notice of appeal and docket entries transmitted to U.S.C.A.; U.S.C.A. # ____.
- Dec 3 TRANSCRIPT of proceedings taken 12/3/82; pages 1-5; Rep: V. Marshall.
- Dec 6 22 OBJECTIONS of plttfs to defts' proposed findings of fact and conclusions of law.
- Dec 6 23 NOTICE of defts of filing proposed findings of fact and conclusions of law and proposed order.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

GENERAL DOCKET

DATE	FILINGS—PROCEEDINGS
(T)12-07-82	Copy of notice of appeal and docket entries from Clerk, District Court (n-2)
(J)12-07-82	4—Appellants' emergency motion for injunction pending appeal (p-7)
(V)12-09-82	Clerk's order, sua sponte, that appellee respond to the pending motion for injunction and address the merits of the appeal, no later than 4:00 p.m. on Friday, December 10, 1982
(T)12-10-82	4—Appellants' motion to consolidate Nos. 82-2445 & 82-2477 (p-10)
(T)12-10-82	4—Appellees' motion for summary affirmance (p-10)
(T)12-10-82	4—Appellees' response in opposition to appellants' emergency motion for injunction pending appeal (p-10)
(T)12-14-82	Certified Original Record (2) volumes (n-2) (also the Record in No. 82-2477)
(J)12-14-82	4—Appellants' reply to appellees' opposition to emergency motion for injunction pending appeal and opposition to appellees' motion for summary affirmance (p-14)
(V)12-16-82	Clerk's order that the motion of appellants to consolidate Nos. 82-2445 and 82-2477 is granted and the motion captioned cases are consolidated for all purposes
(J)12-16-82	4—Appellees' reply to appellants' opposition to appellees' motion for summary affirmance (p-16)

- (V)12-20-82 Per Curiam order that appellants' emergency motion for injunction pending appeal is denied. Appellants have failed to meet the requirements for obtaining an injunction pending appeal. See *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841 (D.C. Cir. 1977); *Virginia Petroleum Jobber Ass'n v. FPC*, 259 F.2d 921 (D.C. Cir. 1958) (per curiam). This denial of extraordinary relief does not constitute a determination on the merits of the case which the Court is proceeding expeditiously to consider; Wald, Ginsburg and Scalia, CJs
- (B)12-23-82 Per Curiam order, sua sponte, that argument herein will be held at 2:00 p.m. on Tuesday, December 28, 1982. Counsel shall confine their argument to the questions set forth in the attached memorandum. Each side will be allotted 24 minutes time at argument; Wald, Ginsburg and Scalia, CJ's
- (B)12-28-82 ARGUED before Wald, Ginsburg and Scalia, CJ's
- (B)01-05-83 Per Curiam order, en banc, sua sponte, that these cases shall be argued before the court, en banc, at 2:00 p.m. on Friday, January 14, 1983. The Court does not contemplate the filing of any additional briefs; CJ Robinson; Wright, Tamm, MacKinnon, Wilkey, Wald, Mikva, Edwards, Ginsburg, Bork and Scalia, CJ's
- (C)01-11-83 Clerk's order, en banc, sua sponte, that the following times are allotted for oral argument: Appellants—30 minutes; Appellees—30 minutes

- (B)01-14-83 ARGUED en banc before CJ Robinson: Wright, MacKinnon, Wilkey, Wald, Mikva, Edwards, Ginsburg and Scalia, CJ's. At the outset, the Court announced that Circuit Judge Tamm and Circuit Judge Bork are members of this panel, but are unable to be present. They will participate in the decision of this case on the record, briefs and tape recordings of oral argument. On motion of Ms. Kanter, Mr. Neubourne, a member of the bar and the State of New York, was allowed to argue pro hac vice for appellants.
- (C)01-27-83 Certified Original Supplemental Record containing one envelope of photographs (Also the record in 82-2477)
- (S)03-09-83 Opinion for the Court Per Curiam.
 Separate opinion filed by Circuit Judge Mikva in which Circuit Judge Wald concurs, in support of a judgment reversing. Chief Judge Robinson and Circuit Judge Wright file a statement joining in the judgment and concurring in Circuit Judge Mikva's opinion with a caveat. Circuit Judge Edwards files an opinion joining in the judgment and concurring partially in Circuit Judge Mikva's opinion. Circuit Judge Ginsburg files an opinion joining in the judgment. Circuit Judge Wilkey files a dissenting opinion, in which Circuit Judges Tamm, MacKinnon, Bork and Scalia concur. Circuit Judge Scalia files a dissenting opinion, in which Circuit Judges MacKinnon and Bork concur.
- (S)03-09-83 Judgment by this Court en banc that the judgment of the District Court on appeal herein is reversed and these cases are remanded to the District Court with instructions to enjoin appellees from prohibiting sleeping by demonstrators in tents on sites authorized for appellants' demonstration, in accordance with the per curiam opinion of this Court filed herein this date.

- (S)03-09-83 Per Curiam order by the Court sua sponte that the clerk shall issue the mandate herein on March 15, 1983.
- (J)03-10-83 15—Appellees' motion for stay of mandate pending application of the Supreme Court for writ of certiorari (p-10)
- (G)03-14-83 4—Appellants' opposition to motion for stay of mandate (p-14)
- (S)03-15-83 Per Curiam order by the Court that appellees' motion for stay of mandate is denied and the Clerk is directed to issue the mandate herein forthwith.
- (S)03-15-83 Copy of opinion and certified copies of judgment and orders of 3-9-83 and 3-15-83 issued to District Court.
- (S)03-17-83 Per Curiam order by the court en banc that the mandate of this Court issued to the United States District Court for the District of Columbia on 3-15-82 be, and it is hereby, recalled and the Clerk of the District Court is directed to return same forthwith.
- (S)03-17-83 Certified copy of order dated 3-17-83 issued to District Judge and District Court.
- (J)03-22-83 Copy of letter dated 03-21-83 from Clerk, Supreme Court advising that the order heretofore entered by the Chief Justice on 03-17-83, is continued pending the timely filing and disposition of a petition for a writ of certiorari
- (B)03-25-83 Mandate returned to this Court pursuant to order dated 03-17-83
- (J)04-26-83 Receipt dated 04-26-83 from Clerk, District Court for Certified Original Record 2 vols.; supplemental record containing one envelope of photographs
- (J)06-13-83 Notice for Clerk, Supreme Court that petition for writ of certiorari was filed in SC No. 82-1998 on 06-07-83
- (J)10-04-83 Certified copy of order from Clerk, Supreme Court granting petition for writ of certiorari in SC No. 82-1998 on 10-03-83

- (V)10-07-83 Clerk's order that certiorari having been granted, the Clerk of the Supreme Court has requested the transmission of the record on appeal to that court. Accordingly the Clerk of the District Court is requested to certify and return to this court the record on appeal previously transmitted, and since returned, in civil action 82-2501
- (J)10-07-83 Letter from Clerk, Supreme Court dated 10-06-83 asking that the record be certified and transmitted to Supreme Court
- (J)10-11-83 Letter dated 10-07-83 from Chief Deputy Clerk transmitting record to the Supreme Court

EXHIBIT A
C.A. No. 82-2501

NATIONAL PARK SERVICE, NATIONAL CAPITAL REGION
APPLICATION FOR A PERMIT TO CONDUCT A DEMONSTRATION OR
SPECIAL EVENT IN PARK AREAS AND APPLICATION FOR A WAIVER
OF NUMERICAL LIMITATIONS ON DEMONSTRATIONS FOR
WHITE HOUSE SIDEWALK* AND/OR LAFAYETTE PARK

Date of this application

1. Individual and/or organization sponsor(s) The Community for Creative Non-Violence

Address(es) 1345 Euclid St. NW DC 20009

Telephone Nos. (include area code) Day ²⁰²⁻667-6407 Evening ²⁰²⁻667-6407

2. This is an application for a permit to conduct a DEMONSTRATION ☒ SPECIAL EVENT (For definitions, see instructions.)

3. This is an application for a WAIVER OF THE NUMERICAL LIMITATIONS on certain demonstrations. Yes ☐ No ☒ (A waiver is required if it is expected that a demonstration on the White House Sidewalk * will include more than 750 participants or that a demonstration in Lafayette Park will include more than 3000 participants.)

4. Date(s) of proposed activity: From 12 21 '82 To 12 29 '82
Month Day Year Month Day Year

Time: Begin 2:00 (a.m.) (p.m.) Terminate: 12 noon (a.m.) (p.m.)

5. Location(s) of proposed activity. (Include assembly and dispersal areas.)

Lafayette Park

The Mall

6. Purpose of proposed activity. To make more visible & concrete the magnitude & the seriousness, and the reality of homelessness

7. Estimated maximum number of participants. (If more than one park area is to be used, list numbers separately for each area.) Lafayette Park - 50
the Mall - 100

8. Will cleanup people be provided for the area? ☒ yes ☐ no
How will they be identified? They will be cleaning up.

9. Person(s) in charge of activity. (One person must be listed as in charge of the activity. If different individuals are to be in charge of various activities at different locations, each must be listed.) Lafayette Park, Mary Ellen Hanks; The Mall, Justin Brown
*/(The "White House Sidewalk" is the sidewalk between East and West Executive Avenues, on the south side of Pennsylvania Avenue N.W.)

-2-

Person in charge Mary Ellen Homb's - Lafayette Park
Justin Beena - The Mall
 Address 1345 Euclid St., NW - DC 20009
 Telephone Nos. (Include area code) Day 202-667-6407 Evening Same

10. Plans for proposed activity. (Include a list of all principal speakers and the complete time schedule for the activity. Include proposed route of any march or parade, and plans for the orderly termination and dispersal of the proposed activity which might affect the regular flow of city traffic.) See attached for details

11. (a) List all props, stages, sound equipment, and other items to be provided by applicant/sponsor. (Include approximate number and size(s) of supports, standards, and handles; necessary medical/sanitary facilities and other similar items.) See attached for details

(b) If boxes, crates, coffins, or similar items will be used, state whether they are to be carried opened or closed, their proposed size, the materials constructed from, and their proposed contents and use. No

12. (a) Do you have any reason to believe or any information indicating that any individual, group, or organization might seek to disrupt the activity for which this application is submitted? _____

(b) If YES, list each such individual, group, or organization, with all information as to each, including addresses and telephone numbers. No

13. Marshals: (a) Will applicant/sponsor furnish marshals? (Required for waivers of numerical limitations and for demonstration activities held simultaneously on White House sidewalk and Lafayette Park.) Yes y - in a sense

No _____. If YES how many marshals will be furnished? From CCAV

(b) Persons(s) responsible for supervision of marshals (for each location):

Location(s) Lafayette Park
The Mall
 Name(s) Mary Ellen Homb's - L.P.
Justin Beena - The Mall
 Address(es) 1345 Euclid St., NW DC 20009

Telephone Nos.: Day 202-667-6407 Evening Same

(c) List the functions the marshals are expected to perform: To maintain order & conformity with the US Court of Appeals
meeting in CCNV Court.

QUESTIONS 14, 15, AND 16 MUST BE ANSWERED IF THIS IS AN APPLICATION FOR A WAIVER OF NUMERICAL LIMITATIONS. IF THIS IS NOT AN APPLICATION FOR A WAIVER, DO NOT ANSWER THESE QUESTIONS.

14. What communications equipment will be provided to the marshals? (Include the number of walkie-talkies, CB radios, bullhorns, public address systems, flashlights, etc.) _____

15. How will the marshals be identified? _____

16. State specifically the plans for ingress and egress of the participants to and from Lafayette Park including proposed sites for loading and unloading of buses, automobiles, or other forms of transportation which the participants are expected to use (supply chart if necessary). _____

APPLICATION NOT VALID UNLESS SIGNED

Member of CCNV

Position of person filing application

Mitch Snyder

Signature of person filing application

Day 202-667-6407 Evening Same

Telephone Nos. of person filing application

Mitch Snyder
 Typed or printed name of person filing application

1345 Euclid St. NW - DC 20009
 Address of person filing application

Community for Creative Non-Violence

345 Euclid Street N.W.
Washington, D.C. 20009
202-667-6407

The U.S. Court of Appeals ruling in *CCNV v. Watt* guarantees us the right to maintain a symbolic campsite in Lafayette park, with sleeping permitted as well. However, previous experience prompts us to clarify the situation for next winter, since we intend to stage a similar demonstration at that time.

We have been reminded on a number of occasions that permits are issued on a first-come, first-serve basis, so it seems best to apply for the appropriate permits at this time. While we know that some regulations require applicants to initiate the process within a certain number of days or hours before the proposed demonstration, we are not aware of any regulations that would prohibit us from filing for and receiving a permit several months in advance. We assume that similar events have occurred many times in the past.

We intend to serve Thanksgiving Dinner in Lafayette Park, just as we did in 1981. We will serve a traditional full-course meal, to be cooked and prepared elsewhere. Dinner will be served from 3 to 5 pm, with at least one-half hour before and after needed for setup and cleanup. Thanksgiving will be on November 25.

We plan to re-erect Reaganville on the first day of winter, December 21, 1982. We will obtain permits for a seven day period beginning on that date, and while it is our intention to maintain the demonstration through the last day of winter (March 20, 1983), we will review that decision on a weekly basis. Conceivably, we could shorten the duration, but it would definitely not continue beyond the 20th of March.

Administration policies are resulting in a drastic increase in unemployment and extreme poverty and destitution. We will try to communicate this increase symbolically by increasing the number of tents from the current 9 to 20. We discovered this year that a maximum of 25 people could comfortably fit in the 9 tents, as compared with our predic-

tion of 50. In reality, while the number of "structures" will be doubling—our way of symbolically communicating the rapid rise in the number of homeless people in our nation—the actual number of persons using the site would be no more than we suggested for the winter just past. The site will be named "Reaganville II".

Congress has allowed the passage of legislation resulting in the devastation of programs on which millions of people rely for their very existence: their role and responsibility is clear. It is equally necessary to confront Congress with a symbolic presence that makes more visible and concrete the results of their inacti^{CN}ve or unwillingness to challenge President Reagan. We *must* take the situation out of the abstract and begin to deal with the human cost of our decisions.

Thus, we also propose the erection of a second symbolic campsite, on the Mall, to be named "Congressional Village." We wish to erect 40 tents on that site, with a maximum capacity of 100. That demonstration would also begin on the first day of winter, December 21, 1982. We would file for seven-day permits. While we would also intend to remain on the Mall until the final day of winter, March 20, 1983, we would review the situation from week to week.

We have carefully considered the rights of others in making these plans, and we feel that our proposal will in no way deny others their legitimate right to use and enjoy these locations. We have proposed doubling the number of tents in Lafayette Park. Our experience this year convinces us that it will not significantly impinge on the rights of others, while allowing us to communicate a message that stresses numbers and growth. We would still be limited to a very small section of the park, just as we would be limited to a small section of the Mall.

No food will be served on either site, nor will toilet facilities be provided. We would be willing to assume responsibility for a "porta-john" for one or both sites, if Interior officials thought it advisable.

Our proposal does not differ from this year's: a symbolic campsite where the homeless may gather, to become visible and accessible, and through their visibility and accessibility

to communicate their humanity, their need, and their plight to the government and to the public, in the *only* real way open to them.

If there was ever any question as to whether sleeping was a necessary element in this demonstration, it should be answered by now. No matter how hard we tried to get them to come to Reaganville, they simply would not come, until sleeping was permitted. This was not the result of lack of encouragement, but because they had no reason to. It is difficult, if not impossible, for people who have adequate food, shelter, and clothing, to understand what it means to barely survive on the day to day basis that the homeless must.

That inability to understand does not change the reality: the homeless are not like others; they do not have open to them the options that others do. They are a unique class of people, a result of a very real handicap. So, absent a survival-related reason for being in Lafayette Park—something such as a meal or the chance to sleep in relative warmth—they did not and would not come. Not even we, and few if any have more experience in working with the homeless, could accomplish that.

While we can and have acted as advocates and spokespersons for the nation's homeless, they *must* begin to speak for themselves. To do so they must be visible and accessible. On the evening when the new and controversial china was first used in the White House, reporters were able to come across the street after the dinner, and ask homeless men and women who were huddled for warmth in the tents what *they* thought of the new \$1000 a setting service. That would not have been possible for either the reporters or the homeless if it had not been for the accessible and controlled environment of Reaganville.

Without the incentive of sleeping space or a hot meal, the homeless would not come to the site. Nor would they be allowed the right to speak symbolically and politically, as they must do if they are to have any hope for change. If sleeping were not permitted, we would not erect tents on either the Mall or in Lafayette Park. In some ways such a demonstration would be counter-productive, further ab-

strating what is already far too abstract: the human cost and misery produced by the cuts in services and programs on which people depend for their continued existence. Were the homeless to be denied this forum, no avenue of speech or redress would be open to them.

We mention this because we know that our plans were not well understood last year, and we hope to help you better understand the situation this year. That understanding is critical to those who, in ever-growing numbers, are forced to call the street their home.

It will take quite a bit of time and effort to obtain the use of 60 tents and the granting of the necessary permits will greatly enhance the possibility. We are not in a position to buy tents, and the legality of a demonstration is extremely important in asking organizations or manufacturers for a donation. Thus, to take care of the logistical considerations, we ask you to please expedite this application.

Given the nature of our proposed activities and the U.S. Court of Appeals ruling in *CCNV v. Watt*, we see no reason why arrangements cannot be concluded expeditiously.

Thank you for your speedy attention to this matter.

EXHIBIT B
C.A. No. 82-2501

In Reply Refer to:
A8227(NCR-PA)
Jul 9, 1982

Mr. Mitch Snyder
1345 Euclid Street, NW
Washington, DC 20009

Dear Mr. Snyder:

This responds to your application on behalf of the Community for Creative Non-Violence for a permit to conduct a demonstration on the Mall and in Lafayette Park from December 21, 1982, to December 28, 1982. Your application for demonstration activities on those dates has been granted. The erection of a symbolic city to emphasize the plight of the poor and homeless is hereby permitted.

However, we cannot permit that portion of your activities that involves camping in those park areas by demonstration participants. Regulations published in 47 FR 24299 (June 4, 1982) amending 36 C.F.R. § 50.19 and 50.27 clarify the prohibitions against camping in park areas not designated as public camp grounds. The term "camping" is defined in the regulations as the use of park lands for living accommodation purposes. These regulations were adopted to clarify the regulations at issue in *Community for Creative Non-Violence v. Watt* by specifying those activities that are prohibited outside of designated camping areas. We are enclosing a copy of that publication for your convenience.

After carefully reviewing your application and supporting document, we have determined that those proposed activities involving the actual housing of fifty to one-hundred persons on park lands, including provisions for sleeping and eating, constitute camping. Since Lafayette Park and the Mall are not designated public camp grounds, such activities are contrary to present regulations governing the use of the National Capital Parks. Therefore, that portion of your activities concerning the use of park

lands for the living accommodation purposes of demonstration participants is prohibited.

We must also point out that while tents or other temporary structures may be used for symbolic or logistical purposes in a demonstration, the regulations cited earlier clarify the prohibition against use of those temporary structures for camping purposes. Therefore, if your tents are used for the living accommodation purposes of the demonstration participants, such use will be contrary to Federal regulations.

If you wish to further discuss the details of your demonstration or if you have questions concerning this matter, please contact Sandra Alley, Associate Regional Director, Public Affairs, at (202) 426-6700.

Sincerely,

Robert Stanton
Regional Director,
National Capital Region
Enclosure

Supreme Court of the United States

No. 82-1998

JAMES G. WATT, SECRETARY OF THE INTERIOR, ET AL.,
PETITIONERS,

v.

COMMUNITY FOR CREATIVE NON-VIOLENCE, ET AL.

ORDER ALLOWING CERTIORARI. Filed October 3, 1983.

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted.

No. 82-1998

IN THE
Supreme Court of the United States
OCTOBER TERM, 1982

JAMES G. WATT, SECRETARY OF THE
INTERIOR, *ET AL.*

Petitioners,

v.

THE COMMUNITY FOR CREATIVE
NON-VIOLENCE, *ET AL.*,

Respondents.

**BRIEF OF RESPONDENTS IN OPPOSITION TO
THE PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT**

BURT NEUBORNE

American Civil Liberties Union Foundation, Inc.
132 West 43rd Street
New York, New York 10036

ARLENE S. KANTER

*LAURA MACKLIN

Institute for Public Representation
600 New Jersey Avenue, N.W.
Washington, D.C. 20001
(202) 624-8390

ARTHUR B. SPITZER

ELIZABETH SYMONDS

American Civil Liberties Union
Fund of the National Capital Area
600 Pennsylvania Avenue, S.E.
Washington, D.C. 20003

*Counsel of Record

QUESTION PRESENTED

Whether the Court of Appeals erred in determining that the government had failed to show how its legitimate and substantial interests were served by prohibiting homeless demonstrators from sleeping on park land when (a) the demonstrators were issued a permit that allowed them to erect tents, to maintain a 24-hour-a-day presence in and around the tents, and to lie down and feign sleep inside the tents, (b) homeless people who were not participating in a demonstration were not prevented from sleeping in the same parks, and (c) other demonstrators had recently been granted a permit to sleep in one of the same parks.

TABLE OF CONTENTS

	<u>Page</u>
QUESTION PRESENTED.....	i
TABLE OF AUTHORITIES.....	iii
STATEMENT.....	1
ARGUMENT:	
I. THE QUESTION PRESENTED DOES NOT WARRANT REVIEW.	7
II. THE COURT OF APPEALS DECISION IS CORRECT.....	16
CONCLUSION.....	25

TABLE OF AUTHORITIES

<u>Cardinale v. Louisiana,</u> 394 U.S. 437 (1969).....	12
<u>Community for Creative Non-Violence v. Watt,</u> 670 F.2d 1213 (D.C. Cir. 1982).....	1,2
<u>Edelman v. Jordan,</u> 415 U.S. 651 (1974).....	15
<u>Illinois v. Gates,</u> No. 81-430 (June 8, 1983)	12
<u>Metromedia, Inc. v. City of San Diego,</u> 453 U.S. 490 (1981)	15
<u>Morton v. Quaker Action Group, 402</u> U.S. 926 (1971)	14,15
<u>O'Hair v. Andrus,</u> 613 F.2d 931 (D.C. Cir. 1979)	19
<u>Spence v. Washington,</u> 418 U.S. 405 (1974)	19,20
<u>United States v. Abney,</u> 534 F.2d 984 (D.C. Cir. 1976)	11

United States v. Grace,
No. 81-1863 (April
20, 1983) 18,23

United States v. O'Brien,
391 U.S. 367 (1968)19,20,
 21,22

Women Strike for Peace
v. Morton, 472 F.2d
1273 (D.C. Cir. 1972) 11,14

36 C.F.R.:

Section 50.5(a) 4
 Section 50.7 - 50.18 10
 Section 50.19(b) 17
 Section 50.19(c)(2)..... 18
 Section 50.19(d)(1)..... 18
 Section 50.19(e)(5)..... 17
 Section 50.19(e)(6)..... 13
 Section 50.19(e)(8)..... 10,11,
 13
 Section 50.24 - 50.35.... 10
 Section 50.25(k)..... 4
 Section 50.27(a) 10,11
 Section 50.39 - 50.45 ... 10
 Section 50.50 - 50.52 ... 10

Miscellaneous:

47 Fed. Reg. (1982):
 pp. 24,299 4
 pp. 24,301 4

The Washington Post,
July 5, 1983 at
C-1 13

No. 82-1998

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1982

JAMES G. WATT, SECRETARY OF THE
INTERIOR, ET AL.,

Petitioners,

v.

THE COMMUNITY FOR CREATIVE NON-
VIOLENCE, ET AL.,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO
THE PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT

STATEMENT

1. Respondent Community for Creative Non-Violence ("CCNV") is a religious association that supplies food, shelter, and other assistance to poor and homeless persons. The individual respondents include members of CCNV and several individual homeless persons.

2. During the winter of 1981-82, CCNV organized a demonstration in one quadrant of Lafayette Park in which homeless people spent the night -- awake and asleep -- to dramatize the seriousness of their plight and to convey to the government and the public the fact that they were without homes or shelter.^{1/} The demonstration was

^{1/} The demonstration was permitted by court order. See Community for Creative Non-Violence v. Watt, 670 F.2d 1213 (D.C. Cir. 1982). The Court of Appeals determined:

[Footnote continued on next page]

peaceful and orderly, and resulted in no damage to park property and no interference with the ability of others to use Lafayette Park in the winter.^{2/}

3. In 1982, CCNV requested permission to conduct a virtually identical demonstration in Lafayette

[Footnote continued from previous page]

[A]s the District Court found, in this case sleeping itself may express the message that these persons are homeless and so have nowhere else to go.... Indeed, the uncontroverted evidence in this case is that the purpose of the symbolic campsite in Lafayette Park is "primarily" to express the protestors' message and not to serve as a temporary solution to the problems of homeless persons. Thus, the only activity at issue here -- sleeping in already erected symbolic tents -- cannot be considered "camping."

Id. at 1216-17 (footnotes omitted). The Park Service did not seek review of that decision in this Court.

^{2/} See, e.g., Declarations of Gabriel Leanza, William Perkins, William Peters at RD 19.

Park and on one section of the Mall during the winter of 1982-83.^{3/} Pursuant to its regulations, the Park Service granted permission for CCNV and the homeless demonstrators to erect tents and to maintain a 24-hour-a-day presence at the demonstration sites.^{4/} Although permitting the demonstrators to sit and lie down on blankets in and around the tents, and to even feign sleep, the Park Service forbade the demonstrators from actually falling asleep. The Park Service claimed that any actual sleeping activity would convert the demonstration into prohibited "camping."

Thus, the only difference between the demonstration that petitioners

^{3/} Exhibit A to Complaint at RD 1.

^{4/} Exhibit C to Complaint at RD 1.

are willing to permit and the demonstration that they contend may be punished as a crime (see 36 C.F.R. §50.5(a)) is the difference between the demonstrators' ability to feign sleep as opposed to actually falling asleep.^{5/}

4. It is also the case that the Park Service does not seek to prohibit all sleeping in Lafayette Park or on the Mall. The regulations permit casual sleeping or napping in both parks during the day or night, see 47 Fed. Reg. 24,299, 24,301 (June 4, 1982); 36 C.F.R. §50.25(k); see plurality opinion at 6a. The Park Service also

^{5/} Although the difference between feigned sleep and actual sleep has no practical significance to the Park Service, it is of crucial importance to the homeless demonstrators, because unless they are allowed to sleep, they will be unable to demonstrate. See, e.g., Declaration of Clarence West at RD 2; declaration of James Wilson at RD 5.

does not prevent individual homeless people, not engaged in demonstration activity, from regularly sleeping overnight in these parks.^{6/}

The Park Service has even permitted other demonstrators to sleep on the Mall. In May, 1982, participants in a Vietnam veterans' demonstration were specifically authorized by the Park Service to sleep as part of their demonstration.^{7/} Both the plurality and the dissenting judges in the court of appeals agreed that the only distinction between their demonstration, which the Park Service did not label

^{6/} See, e.g., Declarations of Mitch Snyder, Mary Ellen Hombs, Carol Fennelly at RD 5.

^{7/} Exhibits 1a-1d to plaintiffs' summary judgment motion at RD 5.

"camping," and the proposed CCNV demonstration, which was proscribed as unlawful "camping," was that the veterans -- whose demonstration was held in warm weather -- did not occupy their tents but slept in the open air. See plurality opinion at 7a; opinion of Wilkey, J., dissenting, at 55a n.19.

5. It is against this factual background that the court of appeals issued a one-sentence per curiam decision allowing the demonstration to proceed. As the plurality of the judges concluded, "the government has failed to show how the prohibition of sleep, in the context of round-the-clock demonstrations for which permits have already been granted, furthers any of its legitimate interests." Plurality opinion at 3a.

REASONS FOR NOT GRANTING THE PETITION

I. THE QUESTION PRESENTED DOES NOT WARRANT REVIEW.

1. An examination of the facts of this case reveals that the dispute between the parties involves a factual difference so narrow as not to merit review. Both parties are in full agreement that the proposed demonstration may involve:

(a) the erection of tents in Lafayette Park and on the Mall, pursuant to a limited-term renewable permit, as part of a demonstration designed to symbolize and dramatize the existence and plight of homeless people;

(b) the presence in and about the tents of homeless persons on a round-the-clock basis to dramatize the fact that human beings are attempting to subsist in the winter without shelter; and

(c) the assumption by the demonstrators of postures of sleep in the tents to dramatize the fact that human beings are actually sleeping out-of-doors in the dead of winter.

The parties are also in full agreement that the proposed demonstration may not involve:

(a) the preparation or serving of food;

(b) the building of any fires;

(c) the erection of any permanent structures;

(d) the breaking of the earth; or

(e) the storage of personal belongings.

In fact, the only point in controversy is whether these demonstrators, while lawfully assuming the posture of sleep during their round-the-clock vigil, may actually fall asleep.

This case simply does not involve the legal issues presented in the petition for certiorari. The only question decided below and presented here for review is whether the Park

Service properly applied its "no camping" regulations to prohibit sleeping in the context of this demonstration. As petitioners recognize, the court of appeals upheld these regulations on their face. Petition for Certiorari at 7 (hereinafter "Petition"). The court merely determined that the Park Service had improperly applied the regulations in the context of this demonstration.

The Park Service has never advanced any substantial governmental interest in prohibiting respondents from actually sleeping as opposed to merely feigning sleep. Rather, it has argued, the government has a significant interest in preventing camping in Lafayette Park or on the Mall. Petition at 13-14. Neither the respondents nor the court of

appeals has denied the legitimacy or significance of that interest.

However, neither camping nor the government's interest in preventing it is at issue in this case.^{8/}

^{8/} The Park Service may continue to apply its regulations prohibiting camping by any and all groups, demonstrating or nondemonstrating. See 36 C.F.R. §§50.19(e)(8) and 50.27(a). Moreover, other provisions of Park Service regulations ensure that no demonstrators or other persons may damage park resources or deprive others of their use. See, e.g., 36 C.F.R. §§50.7 - 50.18, 50.24 - 50.35, 50.39 - 50.45, 50.50 - 50.52. These regulations prohibit the following activities in the parks, inter alia: damaging statues, drinking fountains, plumbing, lawns, and any other park facilities; dumping, storing any materials, or spilling; picnicking in undesignated areas; gambling; soliciting or sales without a permit; committing a nuisance or engaging in disorderly conduct; unauthorized bathing; use of audio devices; lying on park benches; use of liquor; and obstructing entrances, exits, or sidewalks.

2. Petitioners have attempted to broaden the issues presented for review by complaining about earlier decisions by the District of Columbia Circuit.

It is true that those cases may have involved important First Amendment issues.^{9/} But those issues are not presented in this case, since the government chose not to raise them

9/ Women Strike for Peace v. Morton, 472 F.2d 1273 (D.C. Cir. 1972), held that demonstrators had a right to erect temporary structures on park land so long as the government permitted other groups to erect structures at the same location. That case was ultimately settled with the promulgation of Park Service regulations permitting the erection of temporary structures in connection with demonstrations and special events. 36 C.F.R. §§50.19(e)(8) and 50.27(a). United States v. Abney, 534 F.2d 984 (D.C. Cir. 1976), reversed the conviction of a demonstrator simply because the regulation under which he was convicted afforded "totally unfettered discretion" to enforcement personnel. Id. at 986.

either by denying CCNV's application for a permit in any respect other than sleeping, or even by putting those issues before the lower courts. Thus, there is no record of any kind upon which an informed review of those issues could be based; as the Court has noted, "[q]uestions not raised below are those on which the record is likely to be inadequate, since it certainly was not compiled with those questions in mind." Cardinale v. Louisiana, 394 U.S. 437, 439 (1969).^{10/}

^{10/} Just last month, the Court called attention to the "weighty prudential considerations" that militate against the determination of "difficult issues of great public importance" in cases where those issues are not squarely raised below and brought up for review. Illinois v. Gates, No. 81-430 slip op. at 8-9 (June 8, 1983). As in that case, the Court should here decline to address broad issues of constitutional law unnecessary to the decision below -- indeed uninvolved in the case and controversy between the parties.

Moreover, it is not the D.C. Circuit's decisions that "forced" the Park Service to grant CCNV's permit application. Rather, it is the Park Service's own regulations, which permit, inter alia, the erection of temporary structures and a 24-hour presence. See 36 C.F.R. §50.19(e)(8) and (e)(6).^{11/} These regulations simply provide demonstrators with rights or privileges equal

^{11/} Park Service regulations permit the erection of "temporary structures" on park land in connection with demonstrations and special events of all kinds. See 36 C.F.R. §50.19(e)(8). Such structures are frequently erected. For example, on the Fourth of July, 1983, large, covered stages were erected on the Washington Monument grounds and on the Mall for concerts by Wayne Newton and the National Symphony Orchestra, respectively. See The Washington Post, July 5, 1983 at C-1.

to those that the Park Service has long extended to others. For example, for a period of several weeks each winter the Christmas Pageant of Peace is permitted to erect numerous structures, in addition to burning a Yule log and maintaining a group of reindeer on the Ellipse. See Women Strike for Peace v. Morton, 472 F.2d 1273, 1302 (D.C. Cir. 1972) (Wright, J., and Leventhal, J., concurring). If "the government does not agree" (Petition at 14 n.10) with the provisions of its own regulations, it can amend or revoke them in the ordinary way, without this Court's assistance.

3. Nor does the court of appeals' decision conflict with Morton v. Quaker Action Group, 402 U.S. 926 (1971), as petitioners assert. Petition at 10-11. Morton was not a decision on the merits

and is not to be construed as having "the same precedential value as an opinion of this Court treating the questions on the merits." Edelman v. Jordan, 415 U.S. 651, 670-71 (1974); see Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 499 (1981).^{12/}

^{12/} This Court's order in Morton summarily vacated, without explanation, an equally summary action by the court of appeals. 402 U.S. at 926. The entire proceedings in this Court, from the initial filing of the Solicitor General's application for a stay to the issuance of the Court's order, spanned less than twenty-four hours. Id. The unexplicated summary vacation of a summary modification of a preliminary injunction (which is all Morton comprises) is clearly not a decision on the merits. Nor is it the type of "decision of this Court" which Rule 17.1(c) contemplates as a basis for the exercise of certiorari jurisdiction.

Thus, the only question before the Court on this petition is whether the difference to the government between feigned and actual sleep by a group of demonstrators is sufficient to warrant this Court's plenary review. Especially in light of the extraordinary demands upon this Court's resources, the answer is no.

II. THE COURT OF APPEALS
DECISION IS CORRECT.

The court of appeals conscientiously applied the standards enunciated in this Court's First Amendment cases, properly balancing the demonstrators' interests in sleeping as part of their demonstration against the government's purported interest in prohibiting that activity.

1. Petitioners' analysis of this case proceeds from their assertion that

the "primary uses" of Lafayette Park and the Mall are the "enjoy[ment] of nature" and "serenity." Petition at 3-4, 9. Petitioners nowhere explain how respondents' sleeping, which will take place at night and in the winter, when the parks are generally empty, will interfere with anyone's "enjoyment of nature."^{13/} But even assuming arguendo that some interference would occur, such interference cannot provide a basis for prohibiting a demonstration in these parks. As the Court reminded

^{13/} Nor are petitioners correct in suggesting that permitting sleeping as part of a demonstration would interfere with others' use of the parks. Petition at 10. Demonstrators are permitted to use park space on a first-come, first-served, limited-term basis. See 36 C.F.R. §50.19(b) and (e)(5). No additional park space will be used if a demonstration involves sleeping as opposed to a wakeful presence.

the government earlier this Term, "'public places' historically associated with the free exercise of expressive activities, such as streets, sidewalks, and parks, are considered, without more, to be 'public forums'." United States v. Grace, No. 81-1863 slip op. at 5 (April 20, 1983) (emphasis added).^{14/} In view of the regular government-sponsored use of these parks for festivals and public events,^{15/} as

^{14/} As the court of appeals noted, different areas may be subject to differing restrictions. Plurality opinion at 28a n.35. The Park Service's existing regulations, for example, prohibit demonstrations on the grounds of the Lincoln, Jefferson, and Vietnam Veterans memorials. See 36 C.F.R. §50.19(c) (2).

^{15/} See, e.g., 36 C.F.R. §50.19(d)(1) (reserving park areas for official events including the Christmas Pageant of Peace, the Fourth of July Celebration, the Festival of American Folklife, etc.).

well as their availability and constant use for privately-sponsored events,^{16/} petitioners' purported concern for these demonstrators' interference with the serenity and "enjoyment of nature" in the parks is hardly credible and certainly not sufficient to prohibit respondents' proposed demonstration.

2. Furthermore, in adjudicating the issue of "symbolic speech," the court of appeals majority faithfully followed the decisions of this Court in Spence v. Washington, 418 U.S. 405 (1974), and United States v. O'Brien, 391 U.S. 367 (1968).

In Spence, this Court held that, for symbolic conduct to be considered

^{16/} E.g., the Papal Mass held on the Mall on October 7, 1979, which attracted a congregation numbering hundreds of thousands. See O'Hair v. Andrus, 613 F.2d 931 (D.C. Cir. 1979) (refusing to enjoin the celebration of the Mass).

"speech," it must involve "[a]n intent to convey a particularized message ... and in the surrounding circumstances [a] likelihood ... that the message would be understood by those who viewed it." 418 U.S. at 410-11. Both of these criteria are clearly present here. As Judge Edwards observed,

A nocturnal presence at Lafayette Park or on the Mall, while the rest of us are comfortably couched at home, is part of the message to be conveyed. These destitute men and women can express with their bodies the poignancy of their plight. They can physically demonstrate the neglect from which they suffer with an articulateness even Dickens could not match.

Opinion of Edwards, J., concurring, at 33a. See plurality opinion at 14a-15a.

Further, the four-part test articulated in O'Brien assures that "symbolic speech" need not be permitted if it would interfere with a substantial government interest unrelated to

the suppression of free expression. 391
U.S. at 377. The court of appeals
applied the O'Brien test to the
sleeping at issue here, and the
majority concluded that no legitimate
government interest would be served by
permitting demonstrators to spend the
night in tents in Lafayette Park and
on the Mall in feigned postures of
sleep, but arresting them if they dared
to fall asleep. See plurality
opinion at 20a-25a; opinion of Edwards,
J. at 32a-38a; opinion of Ginsburg,
J. at 48a.

Contrary to the government's
assertion, respondents do not claim
that they or anyone has "an absolute
right to deliver a message in the
precise manner thought by the demon-
strator to be maximally effective."
Petition at 14-15. Nor was the court

of appeals' decision based on any such proposition. The court of appeals simply held the government to the O'Brien requirement of showing how the regulation at issue, as applied to the proposed demonstration, served a significant governmental interest. No such showing was made below, and none is suggested in the petition for certiorari.^{16/}

^{16/} Petitioners have advanced several specious arguments in support of their petition for certiorari. They have claimed that they will be unable to distinguish between sleeping as part of a demonstration and camping in the parks. Petition at 10. However, petitioners were able to make precisely such a distinction when they determined that sleeping as part of a veterans' demonstration was not camping, and therefore not prohibited. See, ante pp. 5-6.

Moreover, petitioners' claim that they must now permit any and all persons to camp in Lafayette Park (Petition at 10) is simply unfounded. Neither respondents nor any judge below has ever hinted at such an obligation. There will be time enough to deal with the hypothetical problem of a group advancing a

[Footnote continued on next page]

In sum, the court of appeals properly held that the difference between feigned and actual sleep did not implicate any substantial governmental interests. It is precisely this lack

[Footnote continued from previous page]

pretextual First Amendment justification for sleeping (id. at n.6) if and when such a group appears. No party or judge in this case has ever suggested that CCNV's First Amendment claims are anything but bona fide.

Petitioners suggest that the court of appeals erred by analyzing only the government's interest "in not making an exception [to the regulation] in the particular case at hand." Petition at 14. This characterization of the court's action is inaccurate. The court did not conclude that the regulation was valid but that the government could afford to make one exception. Rather, it held the regulation unconstitutional as applied to respondents' conduct. Surely the government does not mean to suggest that a court can never hold a facially valid regulation unconstitutional as applied to particular conduct. See United States v. Grace, No. 81-1863 (April 20, 1983).

of any governmental interests that renders the government's refusal to grant permission to these demonstrators unlawful. Once the Park Service agreed to the erection of tents and their occupancy by persons feigning sleep around-the-clock, it can hardly argue that a serious interest is compromised by permitting sleep itself. Accordingly, the Park Service's obdurate refusal to permit respondents to sleep was wholly arbitrary and the judgment of the court of appeals was correct.

CONCLUSION

The petition for a writ of certiorari in this case should be denied.

Respectfully submitted,

BURT NEUBORNE
American Civil Liberties
Union Foundation, Inc.
132 West 43rd Street
New York, New York 10036

ARLENE S. KANTER
*LAURA MACKLIN
Institute for Public
Representation
600 New Jersey Avenue, N.W.
Washington, D.C. 20001
(202) 624-8390

ARTHUR B. SPITZER
ELIZABETH SYMONDS
American Civil Liberties
Union Fund of the National
Capital Area
600 Pennsylvania Avenue, S.E.
Washington, D.C. 20003

*Counsel of Record

JULY 1983

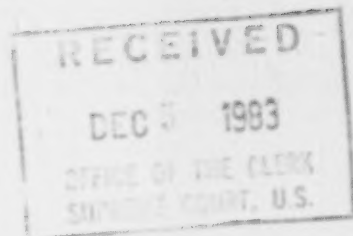
EDITOR'S NOTE

The following motion of respondents for leave to file a supplemental joint appendix was denied by the Court on December 12, 1983 (52 LW 3460). It is reproduced here for completeness.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1983

No. 82-1998



WILLIAM P. CLARK, SECRETARY OF THE INTERIOR, ET AL.,
Petitioners,

v.

THE COMMUNITY FOR CREATIVE NON-VIOLENCE, ET AL.,
Respondents.

MOTION REGARDING REPRODUCTION OF
JOINT APPENDIX

Respondents move for leave to dispense with the filing of a joint appendix produced in its entirety by typeset or printed means, and request permission to lodge with the Court copies of a "supplemental joint appendix" reproduced by photocopying on eight and one-half by eleven inch paper, bound at the left margin. Counsel for petitioners, Alan Horowitz, has stated that petitioners have no objection to the respondents' lodging of a "supplemental joint appendix" reproduced in such form.^{1/}

^{1/} Respondents offered to include in such a photocopied appendix the materials from the record that petitioners had designated for inclusion in the joint appendix (consisting of approximately fifteen pages). However, petitioners decided to reproduce by typesetting the materials they had designated. Therefore, respondents' request for permission to reproduce materials for a "supplemental joint appendix" by photocopying applies only to those materials designated by respondents for inclusion in the joint appendix (consisting of approximately ninety-three pages).

The material respondents seek permission to include in the appendix and to lodge with the Court in this photocopied form is highly pertinent to the Court's understanding of the briefs and the case. Respondents and their counsel have carefully limited the amount of material designated for inclusion in the joint appendix, and have sought to avoid unnecessary designations, in keeping with Rule 30.2 of the Supreme Court Rules. Respondents and their counsel have also limited the length of this material by designating excerpts of documents, rather than entire documents, in many instances. Hence, respondents have made a diligent effort to limit the length, and the concomitant costs, of the joint appendix.

However, even with the limited number of pages designated for the joint appendix (approximately fifteen pages designated by petitioners and ninety-three pages designated by respondents), respondents will not be able to afford to pay for the costs of typesetting the appendix or reproducing it by photo offset printing, in the event that they might be ordered to do so if they do not prevail in this litigation. Respondents estimate these costs to be approximately fifteen hundred to thirty-three hundred dollars.^{2/} By comparison, respondents estimate the cost of reproducing the same amount of material by photocopying on eight and one-half by eleven inch paper to be approximately two hundred and seventy-five dollars.^{3/}

^{2/} The \$3,300 estimate is based on the costs of typesetting one hundred ten pages at a per page cost of \$30. The \$1,500 estimate is based on the costs of photo offset printing of two hundred seventy-five pages (re-typed from an eight and one-half by eleven inch page format to a six by nine inch page format) at a per page cost of \$5.45.

^{3/} The \$275 estimate is based on the costs of photocopying one hundred ten pages at a per page cost of \$2.50 per page.

Hence, respondents are requesting leave of the Court to reproduce the materials they have designated for the joint appendix by this less costly method.

Respondents' financial means are extremely limited. Respondents Clarence West, Monroe Kylandezes, Fred Randall, and Mike Scott are each indigent and homeless. As they each explained in their initial declarations (filed in the district court on September 7, 1982), they have no income, no assets, no home or other property, and are unable to afford any costs that are incurred in this litigation. As respondents Mitch Snyder, Mary Ellen Holmes, and Harold Moss, each ~~members of the~~ Community for Creative Non-Violence, explained in their initial declarations (also filed in the district court on September 7, 1982), they have no income or assets, own no property, and cannot afford costs of this litigation. Each of them spends his or her daily working hours in efforts to provide homeless people with food and shelter (at a soup kitchen, overnight shelter, and day-time drop-in center) and in advocacy on behalf of homeless people. Declarations of Mitch Snyder, Mary Ellen Holmes, and Harold Moss, filed October 7, 1982.

Respondent Community for Creative Non-Violence is an unincorporated religious association; it does not own any property, or have any assets. The CCNV-run soup kitchen, shelter, and drop-in center are staffed entirely through volunteer effort and supplied with contributions solicited from individuals who support these services for homeless persons. Hence, none of the respondents have assets or resources that would be sufficient to pay for the costs of an appendix reproduced by typeset or other printed means, if the respondents were to be ordered to pay costs. Although

respondents realize that they will not be asked to pay such costs if they prevail in this litigation, they cannot in good conscience assume a potential liability of this magnitude.^{4/}

Therefore, respondents respectfully request this Court to grant this motion, consented to by petitioners, for reproduction of the documents they have designated for the appendix, in a "supplemental joint appendix" photocopied on eight and one-half by eleven inch paper and bound at the left margin with appropriate covers. In order to furnish the Court with an illustration of the type size and format for pages in such a photocopied document, respondents have appended, as an attachment to this motion, several sample pages.^{5/}

Respectfully submitted,

Laura W.S. Macklin

Laura W.S. Macklin*
Institute for Public Representation
600 New Jersey Avenue, N.W.
Washington, D.C. 20001
(202) 624-8390

Burt Neuborne
American Civil Liberties Union
Foundation, Inc.
132 West 43rd Street
New York, New York 10036

Arthur B. Spitzer
American Civil Liberties Union Fund
of the National Capital Area
600 Pennsylvania Avenue, S.E.
Washington, D.C. 20003

COUNSEL FOR RESPONDENTS

*/ Counsel of record for respondents.

4/ Currently, respondents are making a good faith effort to obtain contributions to pay for the costs of photocopying appendix materials and reproducing their brief.

5/ If the requested leave to lodge a supplemental joint appendix is granted by the Court, the document filed will resemble, in its bound form, appendices often filed in the courts of appeal, and sometimes permitted by order of this Court, pursuant to Rule 30.7.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THE COMMUNITY FOR CREATIVE
NON-VIOLENCE, et al.,

Plaintiffs,

v.

JAMES G. WATT, Secretary of
the Department of the
Interior, et al.,

Defendants.

Civil Action No.

DECLARATION OF CLARENCE WEST

I, Clarence West, hereby declare:

1. I am a plaintiff in this suit to obtain relief from denial of First Amendment rights to speak, demonstrate and to petition the government for redress of grievances.

2. I believe that I am entitled to relief and redress from the Federal courts and therefore desire, because of my income, to file this suit in forma pauperis under the provisions of 28 U.S.C. §1915.

3. I have no income, no home or other property and no assets. I cannot afford any fees, costs or security that might be incurred in bringing this suit.

4. I have ended up in the streets a couple of times since I lost my family in 1980. When my wife, who was a diabetic, died, her mother took my daughter. She felt a single man had no business raising a daughter. The house we had lived in for ten years was sold. Although I had the first option to buy it,

I was only make \$11,000 a year and I couldn't afford it. This was a very difficult time and everything fell apart for me. I lost my job as a truck driver for Ginn's Office Supply Company and ended up out in the street.

5. After a while, I was able to get a job as a truck driver for JKJ, the largest auto dealership in the metropolitan area. Every day I caught the bus to work at Farragut Square. During the winter I always saw the people in the tents on my way to work. This was a constant reminder that I had been in their shoes only a few months before.

6. On March 3, 1982, I went into the hospital with a double hernia. I was there for seventeen days. When I came out I had lost my job and was back on the street. I spent the first night in a tent at Lafayette Park. It was the first place I thought of. That was March 20th and the tents were coming down.

7. I have been getting by the best I can without a job or a place to live for the last four months. I am not the only one who has lost his job recently. I see the lines at the employment office getting longer and longer. Young people, with less experience that I've got, don't have a chance.

8. Housing is also becoming much worse. Most people are forced to double and triple up. Three families live in an apartment not big enough for one. Many can't get any place at all. I'd guess that if there were fifty thousand people on the streets last year, there must be seventy-five to a hundred thousand now.

9. I would go to the Mall or Lafayette Park this winter to be a living example of what is happening all around me. During the short time I spent in the park last March, I talked with many people, who were passing by, about what was happening there. The important part of it was that we were there twenty-four hours a day. Without that the demonstration would have had no significance.

10. Take a baseball player, for example. He has got to think baseball twenty-four hours a day. Otherwise he'll never be any good. He's got to dream about that ball. With us it's the same, but it's not by choice. We are out in the street dealing with it all twenty-four hours a day. There is no rest from it. That is what we are trying to show in Lafayette Park.

11. Now if I were at the park all day long but disappeared at night, who would know where I'd be going. For all they know I could be laying up in a hotel somewhere, with a suite all my own. Who's to say where I go at night and what I've got to struggle with? But if I am right there for everyone to see, there is no question about what I am going through.

12. I have been sleeping in these federal parks ever since I was a kid. I was born in Washington in 1926. Back in the thirties on hot summer nights the whole family used to go down and sleep in the park. It was too hot inside. We used to sleep in East Potomac Park, Lincoln Park in Northeast, Fort Dupont Park, and Meridian Hill Park. I have been sleeping in these parks ever since and have never been bothered by the

police. Why is it that when I want to do the same thing as part of a protest it suddenly becomes illegal? I guess the government doesn't want to hear what we have to say.

13. Lafayette Park has a special significance for people like me who have grown up in D.C. We call it "Freedom Park" because over the years all the protests and demonstrations for civil rights -- for our people's freedom -- have been held in that park. The only time it was different was in 1963 when Martin Luther King was here. There were so many people we had to go over to the Mall. For me, to demonstrate in Lafayette Park or the Mall would be to carry on a long tradition of my people.

Under penalty of perjury, I hereby declare the foregoing declaration to be true and correct.

Executed this 30 day of August, 1982.


CLARENCE WEST

No. 82-1998

Office-Supreme Court, U.S.

FILED

SEP 16 1983

ALEXANDER L. STEVAS,
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1983

JAMES G. WATT, SECRETARY OF THE INTERIOR,
ET AL., PETITIONERS

v.

THE COMMUNITY FOR CREATIVE NON-VIOLENCE, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT*

REPLY MEMORANDUM FOR THE PETITIONERS

REX E. LEE

Solicitor General

Department of Justice

Washington, D.C. 20530

(202) 633-2217

TABLE OF AUTHORITIES

	Page
Cases:	
<i>Community for Creative Non-Violence v. Watt</i> , 670 F.2d 1213	2
<i>Heffron v. International Society for Krishna Consciousness, Inc.</i> , 452 U.S. 640	5
<i>White House Vigil for the ERA Committee v. Watt</i> , No. 83-1243 (D.D.C. July 19, 1983), modified, No. 83-1775 (D.C. Cir. Aug. 18, 1983), vacated on other grounds, No. 83-1243 (D.D.C. Sept. 2, 1983)	3
Constitution and regulation:	
U.S. Const. Amend. I	2, 3, 4
36 C.F.R. 50.27(a)	3-4
Miscellaneous:	
48 Fed. Reg. 28058-28063 (1983)	3

In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 82-1998

JAMES G. WATT, SECRETARY OF THE INTERIOR,
ET AL., PETITIONERS

v.

THE COMMUNITY FOR CREATIVE NON-VIOLENCE, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT*

REPLY MEMORANDUM FOR THE PETITIONERS

1. Respondents, in their Brief in Opposition, appear to be briefing a different case than the one the government is asking to be reviewed. Respondents tell this Court that the case involves only "a factual difference so narrow as not to merit review" (Br. in Opp. 7); that the "only point in controversy is whether these demonstrators, while lawfully assuming the posture of sleep * * * may actually fall asleep" (*id.* at 8); and that "the only question before the Court * * * is whether the difference to the government between feigned and actual sleep by a group of demonstrators is sufficient to warrant this Court's plenary review" (*id.* at 16). "[A]gainst this factual background," respondents go on, "the court of appeals issued a one-sentence *per curiam* decision allowing the demonstration to proceed" (*id.* at 6). Respondents also state that "the only question decided below and presented here for review is whether the Park Service properly applied its 'no camping' regulations to

prohibit sleeping in the context of this demonstration" (*id.* at 8-9); and that the "court [of appeals] merely determined that the Park Service had improperly applied the regulations" (*id.* at 9).

As a description of the case actually before the Court, respondents' account seems to us to fall somewhat short of complete success. This is a case that the court of appeals regarded as so significant that it set it for en banc rehearing *sua sponte* and before panel decision. The "one-sentence *per curiam* decision" was issued because the judges divided 6-5 and could not agree on a majority opinion; in fact six separate opinions totaling some 85 pages were delivered. A reading of the lengthy opinions will reveal that none of the eleven judges below suggested that "the Park Service had improperly applied the regulations"; all of them agreed that the regulations do prohibit the sleep-in proposed by respondents as part of their demonstration.¹ All eleven judges conceived the issue to be whether the regulations as so applied infringed respondents' rights under the First Amendment to the Constitution of the United States. Five major opinions on this important issue of constitutional law were in fact delivered.

¹ Respondents' contention that the only question presented here is whether the regulations were properly applied is particularly ironic in light of the history of the regulations at issue. In 1981, the National Park Service also applied its regulations to deny respondents a permit to use Lafayette Park as an overnight sleeping area in connection with a similar demonstration. The court of appeals held, however, that the proposed sleeping activity, because it was intended to be expressive, was not barred by the then-existing regulations against camping. *Community for Creative Non-Violence v. Watt* ("CCNV I"), 670 F.2d 1213 (D.C. Cir. 1982). As respondents note (Br. in Opp. 2 n.1), the government did not seek review in this Court of this dubious holding that the National Park Service had misinterpreted its own regulations, but instead amended its regulations to make their intent clear beyond doubt. Accordingly, in this case involving the amended regulations the only issue is the constitutionality of enforcing concededly applicable regulations.

In the government's view, as in that of all eleven judges of the court of appeals, this is an important constitutional litigation, not the exercise in trivialities described by respondents. The case involves fundamental questions concerning the extent to which the First Amendment restricts the authority of the National Park Service to regulate the areas of Washington, D.C. that constitute, in many ways, the symbolic heart of the country: the National Memorial-core area parks. More particularly, the questions are whether conduct such as sleeping is "speech" entitled to special constitutional protection and, if so, what is the proper accommodation between that interest and the public interest in safeguarding other uses of this small unique area. The court of appeals' misguided analysis of these important and recurring issues clearly warrants review by this Court.²

2. This case has nothing to do with the "difference to the government" between "feigned" and "actual" sleep. The regulations whose constitutionality is at issue prohibit

²As the plurality below stated (Pet. App. 29a-30a), similar First Amendment questions are bound to recur frequently in the District of Columbia Circuit. Indeed, the decision below has already been relied on in a district court decision modifying regulations concerning demonstrations on the White House sidewalk that were promulgated to protect the safety of the President. The litigation over these regulations further illustrates the excessively detailed scrutiny to which the National Park Service's reasonable regulatory actions are subjected under the court of appeals' treatment of these First Amendment issues. For example, the safety regulations prohibited, *inter alia*, the use of hollow metal sign supports because of the danger that a bomb might be secreted inside. See generally 48 Fed. Reg. 28058-28063 (1983). The district court entered a preliminary injunction striking down this prohibition (among others) partly because it did not also apply to other items that included metal tubing, such as baby strollers. The court of appeals modified the order pending trial to permit the use of hollow metal tubing as a sign support only if it is permanently secured in a manner that prevents the insertion or ejection of an object from the tubing. See *White House Vigil for the ERA Committee v. Watt*, No. 83-1243 (D.D.C., July 19, 1983), slip op. 11-12, 19-20, modified, No. 83-1775 (D.C. Cir. Aug. 18, 1983), vacated on other grounds, No. 83-1243 (D.D.C. Sept. 2, 1983).

camping — defined as “the use of the parkland for living accommodation purposes such as sleeping * * *.” 36 C.F.R. 50.27(a). Sleeping overnight at a site is a central constituent of the activity of camping. The question is whether demonstrators who propose to sleep overnight in tents in Lafayette Park and the Mall for a period of several weeks have a constitutional right to do so, simply because they allege that their sleep is “expressive”—either in general (Judge Mikva) or because it communicates the substantive message of homelessness (Judge Edwards).

“Feigned sleep” has nothing to do with camping and thus is not forbidden in the regulations. Nor is jogging, chatting, or sunbathing. But the case is not about the difference between these activities, on the one hand, and “the use of the parkland for living accommodation purposes such as sleeping * * *” on the other. It is about whether the public interest in enforcing the prohibition against camping in Lafayette Park and the Mall is sufficiently substantial to outweigh the respondents’ First Amendment interest (if any) in using Lafayette Park and the Mall as sleeping quarters.

Respondents seek to “nickel and dime [the] regulation to death” (see Pet. App. 64a) by showing that many activities that do *not* constitute “camping” (e.g., feigning sleep or taking catnaps) are allowed. They also make much of the point that, under pressure from previous D.C. Circuit precedents — and, be it said, in order to be as sensitive as possible to First Amendment considerations — the regulations permit the erection of temporary structures and the maintenance of a 24-hour presence in connection with demonstrations. The government has, of course, never in any way conceded that these activities are *constitutionally* privileged; and it is our hope that this Court will, in deciding this case, make clear that the series of decisions by the court of appeals steadily eroding the power of the National Park

Service reasonably to regulate the conduct of demonstrations in the Memorial core parks have increasingly diverged from established First Amendment principles. But the actual issue for decision in this case is whether the Constitution permits the government to prohibit "the use of park land for living accommodation purposes such as sleeping * * *" — *i.e.*, camping — in the Memorial-core area. And that question, of course, turns not on whether it would cause serious harm to make a special exception for these specific respondents and allow them to sleep (as well as catnap or feign sleep), but whether serious harm would be caused by a general rule allowing all demonstrators who wish to engage in "expressive sleep" to camp in Lafayette Park and the Mall. See Pet. App. 63a-66a.

3. Respondents claim that the "no camping" regulations prevent them from demonstrating at all (Br. in Opp. 4 n.5). The assertion is absurd. Respondents can march, sing, speak, lie down, stand up, carry signs — all for 24 hours a day, in or out of their symbolic campsites. They have chosen not to do so, because they have been told they must go elsewhere to sleep. No doubt it would be a convenience to respondents if they were permitted to camp at the site where they are demonstrating. Perhaps they feel that sleeping in Lafayette Park and the Mall would enhance the force of their protest. But, as we explained in our petition (at 14-15), the Constitution does not guarantee the right to deliver a message in precisely the manner desired. See, *e.g.*, *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 647 (1981). The court of appeals' conclusion opens the door to countless other claims of First Amendment protection for conduct deemed to be expressive and thus seriously undermines the National Park Service's ability to regulate park uses. The potential problems created by this decision and the absurd result reached in the case itself — that the First Amendment guarantees respondents the right to use Lafayette Park and the Mall as sleeping quarters — warrants review by this Court.

For these reasons and the reasons stated in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

REX E. LEE
Solicitor General

SEPTEMBER 1983

No. 82-1998

Office - Supreme Court, U.S.

FILED

DEC 17 1983

In the Supreme Court of the United States

OCTOBER TERM, 1983

WILLIAM P. CLARK, SECRETARY OF THE INTERIOR,
ET AL., PETITIONERS

v.

COMMUNITY FOR CREATIVE NON-VIOLENCE, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE PETITIONERS

REX E. LEE

Solicitor General

J. PAUL McGRATH

Assistant Attorney General

PAUL M. BATOR

Deputy Solicitor General

ALAN I. HOROWITZ

Assistant to the Solicitor General

LEONARD SCHAITMAN

KATHERINE S. GRUENHECK

Attorneys

Department of Justice

Washington, D.C. 20530

(202) 633-2217

QUESTION PRESENTED

Whether the National Park Service violated the First Amendment by enforcing 36 C.F.R. 50.27(a), which restricts camping in the national parks, to prevent respondents from sleeping in Lafayette Park and on the Mall in connection with a demonstration of the plight of the homeless.

PARTIES TO THE PROCEEDING

Manus J. Fish, Regional Director of the National Capital Region of the National Park Service, was named as a defendant in the complaint and is a petitioner here. Mitch Snyder, Mary Ellen Hombs, Harold Moss, Clarence West, Monroe Kylandezes, Fred Randall, and Mike Scott were plaintiffs in the district court and are respondents here.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Constitutional and regulatory provisions involved	1
Statement	2
Introduction and summary of argument	10
Argument:	
I. No significant First Amendment values are served by giving respondents the right to use the Memorial area parks as sleeping quarters	18
A. The act of sleeping has such limited communicative power that it should be accorded little or no First Amendment protection	18
B. The court of appeals' overinclusive approach to what constitutes "symbolic speech" is analytically flawed and contradicts this Court's cases	27
II. The ban on camping in the Memorial parks serves a significant public interest and does not threaten First Amendment values	31
A. Under this Court's balancing test the "no camping" regulation is amply justified as a content-neutral measure narrowly tailored to serve an important public purpose unrelated to the suppression of free expression....	31
B. The court of appeals failed properly to evaluate the government interest in preventing camping in the Memorial area parks	40
Conclusion	50
Appendix	1a

IV

TABLE OF AUTHORITIES

Cases:	Page
<i>A Quaker Action Group v. Morton</i> , C.A. No. 688-69 (D.D.C. Apr. 16, 1971), modified, C.A. No. 71-1276 (D.C. Cir. Apr. 19, 1971), vacated, 402 U.S. 926	19
<i>A Quaker Action Group v. Morton</i> , 516 F.2d 717..	44
<i>Adderley v. Florida</i> , 385 U.S. 39	25
<i>Board of Education v. Barnette</i> , 319 U.S. 624	23
<i>Brown v. Louisiana</i> , 383 U.S. 131	21, 22
<i>Cantwell v. Connecticut</i> , 310 U.S. 296	35
<i>Carey v. Brown</i> , 447 U.S. 455	31
<i>Cohen v. California</i> , 403 U.S. 15	20
<i>Community for Creative Non-Violence v. Watt</i> , 670 F.2d 1213	5
<i>Consolidated Edison Co. v. Public Service Commission</i> , 447 U.S. 530	31, 32, 34
<i>Cox Broadcasting Co. v. Cohn</i> , 420 U.S. 469	26
<i>Elrod v. Burns</i> , 427 U.S. 347	26
<i>First Nat'l Bank v. Bellotti</i> , 435 U.S. 765	31
<i>Grayned v. City of Rockford</i> , 408 U.S. 104	32, 36
<i>Heffron v. International Society for Krishna Consciousness, Inc.</i> , 452 U.S. 640	18, 25, 32, 35, 46
<i>Illinois Elections Board v. Socialist Workers Party</i> , 440 U.S. 173	48
<i>Konigsberg v. State Bar</i> , 366 U.S. 36	30
<i>Kovacs v. Cooper</i> , 336 U.S. 77	17
<i>Kunz v. New York</i> , 340 U.S. 290	35
<i>Linmark Associates, Inc. v. Willingboro</i> , 431 U.S. 85	30
<i>Metromedia, Inc. v. City of San Diego</i> , 453 U.S. 490	26, 30
<i>Niemotko v. Maryland</i> , 340 U.S. 268	37
<i>Perry Education Ass'n v. Perry Local Educator's Ass'n</i> , No. 81-896 (Feb. 23, 1983)	32
<i>Police Dep't of Chicago v. Mosley</i> , 408 U.S. 92	31, 37
<i>Schad v. Borough of Mount Ephraim</i> , 452 U.S. 61..	34, 36
<i>Schneider v. State</i> , 308 U.S. 147	17
<i>Shuttlesworth v. City of Birmingham</i> , 394 U.S. 147	17, 35

Cases—Continued

Page

<i>Southeastern Promotions, Ltd. v. Conrad</i> , 420 U.S. 546	26
<i>Spence v. Washington</i> , 418 U.S. 405	6, 13, 20, 21, 23, 24, 27, 31
<i>Stromberg v. California</i> , 283 U.S. 359	21
<i>Tinker v. Des Moines School District</i> , 393 U.S. 503	13, 17, 19, 20, 21, 23
<i>United States v. Abney</i> , 534 F.2d 984	3, 44
<i>United States v. Grace</i> , No. 81-1863 (Apr. 20, 1983)	15, 32, 33
<i>United States v. Martinez-Fuerte</i> , 428 U.S. 543	48
<i>United States v. O'Brien</i> , 391 U.S. 367	passim
<i>United States Postal Service v. Council of Green-</i> <i>burgh Civic Associations</i> , 453 U.S. 114	32, 46, 47
<i>Vietnam Veterans Against the War v. Morton</i> , 506 F.2d 53	19
<i>Virginia State Board of Pharmacy v. Virginia Citi-</i> <i>zens Consumer Council, Inc.</i> , 425 U.S. 748	34
<i>Women Strike for Peace v. Morton</i> , 472 F.2d 1273 ..	44
<i>Wooley v. Maynard</i> , 430 U.S. 705	17

Constitution, statutes and regulations:

U.S. Const. Amend. I	passim
16 U.S.C. 1	3
16 U.S.C. 1a-1	3
16 U.S.C. 3	3
36 C.F.R.:	
Section 3.4(i) (1939)	3
Section 3.7(n)-(q) (1943)	4
Section 50.19	4
Section 50.19(c)	4
Section 50.19(e) (8)	5, 6, 44, 1a
Section 50.25(k)	3
Section 50.27(a)	4, 6, 38, 1a

Miscellaneous:

<i>Ely, Flag Desecration: A Case Study in the Roles</i> <i>of Categorization and Balancing in First Amend-</i> <i>ment Analysis</i> , 88 Harv. L. Rev. 1482 (1975)	20, 24, 31, 34, 48
--	--------------------

Miscellaneous—Continued	Page
T. Emerson, <i>The System of Freedom of Expression</i> (1970)	20
47 Fed. Reg. (1982) :	
pp. 24299-24306	5
p. 24299	35
pp. 24301-24302	35
p. 24301	39, 49
p. 24302	35, 36
Henkin, <i>The Supreme Court, 1967 Term—Fore-</i> <i>word: On Drawing Lines</i> , 82 Harv. L. Rev. 63 (1968)	20, 22
National Park Service, U.S. Dep't of the Interior, <i>Historic Research Series No. 1, Lafayette Park</i> (G. Olszewski 1964)	2
National Park Service, U.S. Dep't of Interior, <i>History of the Mall</i> (G. Olszewski 1970)	2, 36
National Park Service, U.S. Dep't of the Interior, <i>Resource Management Plan for President's Park</i> (1983)	2
Note, <i>Symbolic Conduct</i> , 68 Colum. L. Rev. 1091 (1968)	24
L. Tribe, <i>American Constitutional Law</i> (1978)	24, 30, 31, 34

In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 82-1998

WILLIAM P. CLARK, SECRETARY OF THE INTERIOR,
ET AL., PETITIONERS

v.

COMMUNITY FOR CREATIVE NON-VIOLENCE, ET AL.

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-87a) is reported at 703 F.2d 586. The opinion and order of the district court (Pet. App. 90a-112a) are not reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 88a-89a) was entered on March 9, 1983. The petition for a writ of certiorari was filed on June 7, 1983, and was granted on October 3, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND REGULATORY PROVISIONS INVOLVED

The First Amendment and the relevant regulations are set forth in the Appendix, *infra*.

STATEMENT

1. This case involves a clash between the interests of the government in regulating for the benefit of the general public the uses of the National Memorial-core area parks—specifically, Lafayette Park and the Mall—and the asserted First Amendment interests of persons wishing to use these parks for sleeping accommodations in order to demonstrate the plight of the homeless.

The National Memorial-core parks are set in the heart of Washington, D.C. They were included in the original plan drawn up for the capital by Major Pierre L'Enfant. The Mall creates a matchless vista stretching from the rear of the Capitol on the east to the Lincoln Memorial on the west, and includes the Washington Monument and a series of reflecting pools.¹ Lafayette Park is a square of approximately seven acres located across the street from the White House.² It was originally included in the "President's Park" (the White House grounds); President Jefferson decided, however, to set aside this area as a separate park for the use of residents and visitors to Washington. In 1824 it was named Lafayette Park in honor of Major General Marquis de Lafayette, hero of the American Revolution. The park contains five statues honoring heroes of the early days of the Republic, and "functions as a formal garden park of meticulous landscaping with flowers, trees, fountains, walks and benches * * *." National Park Service, U.S. Dep't of Interior, *Resource Management Plan for President's Park* 4.3 (1983). In addition to the physical splendor of these parks, in the nearly 200 years since the L'Enfant Plan was designed both Lafayette Park and the Mall have taken on a rich historical and symbolic significance. They are visited by millions who seek to find enjoyment and

¹ A thorough history of the Mall is contained in National Park Service, U.S. Dep't of Interior, *History of the Mall* (G. Olszewski 1970).

² See National Park Service, U.S. Dep't of Interior, *Historic Research Series No. 1, Lafayette Park* at vii (G. Olszewski 1964).

inspiration in their beauty, their serenity, and their evocation of our country's past.

The Memorial-core area parks are administered today as part of the network of national parks. Since 1893, the Interior Department, through the National Park Service, has been charged with responsibility for management and maintenance of all national parks. The National Park Service is required to

promote and regulate the use of the * * * national parks * * * by such means and measures as conform to the fundamental purpose of said parks, * * *, which purpose is to conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations.

16 U.S.C. 1. The Secretary of the Interior is authorized to promulgate rules and regulations for the use and management of these parks in accordance with the purposes for which they were established. 16 U.S.C. 3, 1a-1.

Pursuant to this authority, the Secretary of the Interior has adopted a variety of rules and regulations governing the use of the Memorial-core area parks. From the inception of the modern regulation of these areas, it seemed obvious that it would be completely contrary to the purposes of these splendid and unique parks to allow people to camp in them; consequently, sleeping or camping with intent to remain more than four hours has been prohibited. See 36 C.F.R. 3.4(i) (1939); 36 C.F.R. 50.25(k).³ In 1941, regulations were issued governing

³ In *United States v. Abney*, 534 F.2d 984 (D.C. Cir. 1976), the court of appeals held that this regulation could not constitutionally be applied to prevent a demonstrator from holding an around-the-clock vigil in the park because the regulation (by containing a proviso permitting the conduct in question "upon proper authorization of the Superintendent") gave the park superintendent unfettered enforcement discretion.

the holding of public assemblies, speeches, and the public expression of views in the park areas. The regulations allowed these activities to take place in most park areas upon the issuance of a permit, but in certain areas—including Lafayette Park—"public gatherings and the making of speeches" were prohibited on the ground that "the particular purpose to which the area is devoted makes its use for public gatherings contrary to the comfort, convenience and interest of the general public." 36 C.F.R. 3.7(n)-(q) (1943). In the 1968 revision of the regulations, Lafayette Park was deleted from the list of areas in which demonstrations could not be held. See 36 C.F.R. 50.19(c).

The regulations now in effect permit camping in the national parks only in campgrounds designated for that purpose by the Superintendent of Public Parks. 36 C.F.R. 50.27(a). No such campgrounds are—or ever have been—designated in the Memorial-core area. "Camping" is defined as the "use of park land for living accommodation purposes such as sleeping activities, or making preparations to sleep (including the laying down of bedding for the purpose of sleeping), or storing personal belongings, or making any fire, or using any tents or * * * other structure * * * for sleeping or doing any digging or earth breaking or carrying on cooking activities." *Ibid.* The regulation further provides that "[t]he above-listed activities constitute camping when it reasonably appears, in light of all the circumstances, that the participants, in conducting these activities, are in fact using the area as a living accommodation regardless of the intent of the participants or the nature of any other activities in which they may also be engaging." *Ibid.*

The current regulations also authorize holding demonstrations for the expression of views or grievances in the Memorial-core area pursuant to 36 C.F.R. 50.19. With minor exceptions, such demonstrations may be held only in accordance with an official permit issued by the National Park Service. *Ibid.* The regulations recognize that

temporary structures may be erected in connection with permitted demonstrations but provide that such structures may not be used for camping. 36 C.F.R. 50.19(e) (8).⁴

2. In 1982, respondent Community for Creative Non-Violence (CCNV) applied for a permit from the National Park Service to conduct a demonstration in Lafayette Park and on the Mall beginning on December 21, 1982, and continuing through the last day of winter, for the stated purpose of demonstrating the plight of the homeless (J.A. 9-15). In particular, CCNV requested permission to erect 60 symbolic tents, lay down bedding, and have approximately 150 participants sleep at the campsite as part of its demonstration (Pet. App. 92a-93a).⁵ CCNV explained in its application materials that, "absent a survival-related reason for being in Lafayette Park—something such as a meal or the chance to sleep in relative warmth—they [the homeless] * * * would not come" and that "[w]ithout the incentive of sleeping space or a hot meal, the homeless would not come to the site" (J.A. 14; Pet. App. 45a n.10, 69a, 93a). The National Park Service granted the permit on a seven-day, renewable basis but denied CCNV permission to lay down bedding or sleep in the symbolic tents, citing the camp-

⁴ These regulations were revised effective June 4, 1982. See 47 Fed. Reg. 24299-24306. The revisions, in particular the explicit statement that the use of an area for living accommodation purposes constitutes "camping" regardless of the intent of the participants, were prompted by the decision in *Community for Creative Non-Violence v. Watt (CCNV I)*, 670 F.2d 1213 (D.C. Cir. 1982), which held that sleeping in tents by demonstrators in connection with First Amendment activities did not constitute "camping" prohibited under then-existing regulations.

⁵ CCNV had held a similar demonstration on a much smaller scale the previous winter after the court of appeals held in *CCNV I* that the National Park Service's "no camping" regulations did not extend to the activities in which CCNV sought to engage because they were related to First Amendment activities. That demonstration consisted of setting up and sleeping in nine tents in Lafayette Park. See *CCNV I*, 670 F.2d at 1215.

ing prohibition in the pertinent regulations, 36 C.F.R. 50.19(e) (8) and 50.27(a) (J.A. 16-17).

On September 7, 1982, CCNV and the other named plaintiffs, who are described as either individual members of CCNV or homeless individuals, brought this suit in the United States District Court for the District of Columbia, challenging the constitutionality of the relevant regulations. CCNV sought a preliminary injunction against enforcement of these regulations, arguing that they were vague, overbroad, unequally enforced, and violative of respondents' First Amendment rights. Both parties filed motions for summary judgment.

The district court denied the request for an injunction and granted summary judgment for the government, holding that the regulations were valid both on their face and as applied (Pet. App. 91a-112a). The court first concluded that the act of sleeping in this context was not "sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth amendments." *Id.* at 102 (quoting *Spence v. Washington*, 418 U.S. 405, 409 (1974)). The court further held that under the standards set forth in *United States v. O'Brien*, 391 U.S. 367 (1968), any incidental restriction on First Amendment rights created by the regulations was justified (Pet. App. 104a-106a). The court also rejected respondents' contention that the regulations had not been fairly and uniformly enforced (*id.* at 106a-108a).

3. Respondents appealed, and a panel of the court of appeals heard argument. Before the panel decided the case the court sua sponte directed that it be heard en banc. In a one sentence per curiam decision, the en banc court, by a 6-5 vote, reversed the district court and enjoined the government "from prohibiting sleeping by demonstrators in tents in sites authorized for [respondents'] demonstration" (Pet. App. 2a).⁶ This disposition

⁶ On March 17, 1983, the Chief Justice ordered the mandate of the court of appeals recalled and stayed its reissuance pending further order of the Court. On March 21, 1983, the full Court con-

was supported by a plurality opinion, joined in whole by two judges and in part by three other judges, and by three concurring opinions. The splintered majority agreed that the National Park Service's "no camping" regulations were valid on their face. It was also agreed that, in the circumstances of this case, to apply them to bar sleeping as part of CCNV's demonstration would violate the First Amendment. There was, however, no consensus as to why the regulations as applied violated respondents' First Amendment rights.

The plurality opinion of Judge Mikva (joined by Judge Wald) found that, in the context of this demonstration, sleeping in symbolic tents would be a communicative act and hence protected by the First Amendment. Seeking to eschew "wooden categorizations" (Pet. App. 13a), Judge Mikva explained that "the sleeping proposed by CCNV is carefully designed to, and in fact will, express the demonstrators' message that homeless persons have nowhere else to go" (*id.* at 14a), and that "[i]n the present case, within the context of a large demonstration with tents, placards and verbal explanations, the communicative context is sufficiently clear that the participant's sleeping cannot be arbitrarily ruled out of the arena of expressive conduct" (*id.* at 15a (footnotes omitted)). In any event, even apart from "the peculiarly expressive nature of sleeping," stated Judge Mikva, CCNV's "proposed 'presence' is intended to be expressive" and, consequently, "CCNV's twenty-four hour presence is entitled to the same first amendment protection as a vigil" (*id.* at 17a).

On the other hand, continued Judge Mikva (*id.* at 18a (footnote omitted)):

we reject CCNV's contention that sleeping in its demonstration is uniquely deserving of first amendment protection because it directly embodies the group's message that homeless people have no place else to sleep. Under CCNV's distinction, a group

tinued that order in effect pending the timely filing and disposition of a petition for a writ of certiorari (No. A-771).

with a "no-place-to-sleep" message (such as the homelessness of refugees) could express it by deliberately sleeping, but a group with a different message (such as opposition to the nuclear arms race) could not sleep. Such a distinction is impermissible * * *.

Purporting to apply the analysis set forth by this Court in *United States v. O'Brien, supra*, Judge Mikva then turned to the question whether the government's interests in enforcing the regulations "are furthered by prohibiting expressive sleeping by all individuals or groups similarly situated to CCNV" (Pet. App. 22a). He concluded that "there are no incremental savings of park resources" to be gained by prohibiting sleep (*id.* at 22a-23a). Judge Mikva stated that the National Park Service was entitled to distinguish, in applying its regulation, between "sleeping that is expressive as part of a twenty-four hour vigil * * * [and] sleeping that is a mere convenience to daytime demonstrators" (*id.* at 25a). He concluded that the government's interests would not be sufficiently furthered "by keeping these putative protestors" from sleeping (*id.* at 28a).

As to the future, Judge Mikva's opinion concluded (Pet. App. 29a-30a (footnote omitted)):

Finally, the Park Service cannot mechanically apply its regulations to requests from groups seeking to exercise first amendment rights through sleeping. Although the government can and must retain a "content-neutral" obliviousness to the kind of message which a particular group seeks to express through sleeping, the Park Service cannot be oblivious to the implications of the first amendment—or the attendant complications. Each distinction and each line the Park Service draws in such applications must bear close scrutiny to ensure that symmetry of management does not crowd out first amendment claims.

We doubt that this will be the last occasion that this court will have to undertake the difficult reconciliation of first amendment activities with the

necessity for order and management in the Mall and Lafayette Park. In a pluralistic society boasting of its free expression, we can expect no less.

Chief Judge Robinson and Judge Wright concurred, with the caveat that they "intimate[d] no view as to whether sleeping would implicate the First Amendment were it not to add its own communicative value to the demonstration" (Pet. App. 31a). Judge Edwards filed a concurring opinion, disagreeing with portions of Judge Mikva's opinion, but reaching the same result (*id.* at 32a-40a). Judge Edwards stated that, on the facts of this particular case, sleeping was "symbolic speech" covered by the First Amendment (*id.* at 33a-34a). He argued that it was not impermissible for the government to distinguish between sleep where a "message is intended" and sleep that is merely facilitative (*id.* at 36a). He concluded that under *O'Brien* the regulations could not constitutionally be applied to bar CCNV's demonstration because there are "reasonable * * * regulatory alternatives less restrictive * * * than a total ban against sleeping [that] still would accommodate the significant governmental interests at stake" (*id.* at 39a). Among the alternatives mentioned by Judge Edwards as less restrictive than a "total ban" on sleeping were rules limiting the number who may sleep, first-come-first-served rules, and—"perhaps"—rules preventing a person from sleeping "beyond a specified, successive number of hours or days" (*ibid.*).

Judge Ginsburg concurred only in the judgment (Pet. App. 41a-48a). She characterized respondents' sleeping as "speech plus" (*id.* at 46a) that was not necessarily entitled to the same protection as traditional speech, but was sufficient "to require a genuine effort to balance the demonstrators' interests against other [government] concerns" (*id.* at 47a). Because she found it irrational to allow "tenting, lying down, and maintaining a twenty-four hour presence" while forbidding sleeping, Judge Ginsburg concluded that the line drawn in the regula-

tions was not sufficiently “sensible, coherent, and sensitive to the speech interest involved” (*id.* at 48a).

Judge Wilkey, joined by four judges, dissented (Pet. App. 49a-77a). Although expressing considerable doubt on the issue (*id.* at 56a-60a), Judge Wilkey assumed that respondents’ sleeping activity could constitute a form of communication protected by the First Amendment and that the *O’Brien* analysis was therefore applicable (*id.* at 60a). Examining the general government interest in preventing camping in the Memorial-core area (see *id.* at 63a-66a), Judge Wilkey concluded that the regulation served a substantial interest in conserving park resources and preserving the right of non-campers to enjoy the parks; he found that this interest outweighed occasional incidental restrictions on the activities of demonstrators (*id.* at 66a-71a). Judge Wilkey further stated that there was no constitutionally permissible less restrictive alternative to the total ban on camping (*id.* at 71a-77a) because “[a]ny intermediate position designed to accommodate ‘First Amendment camping’ would run afoul of the prescriptions against discretionary screening” (*id.* at 73a). Judge Scalia, joined by two judges, filed a separate dissenting opinion (*id.* at 78a-87a) denying that “sleeping is or can ever be speech for First Amendment purposes” (*id.* at 78a). Because the regulations proscribe the activities in question for reasons having nothing to do with their communicative character, Judge Scalia concluded that they did not implicate First Amendment concerns.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Memorial-core area parks—as the name itself implies—constitute a unique national resource. Established as part of the celebrated original design to create a noble capital city, they are a memorial to our nation’s past and an evocation of our aspirations for beauty and community. They constitute a “core”—a heartland. They belong to us all. They are visited by millions, who come to wander and stroll, to play or jog, to stand in awe at

the Washington Monument or in reverence at the Vietnam Memorial.

Just because these areas have a special place in the national consciousness and because they have such resonance, they also constitute a fitting and powerful forum for political expression and political protest. When Marian Anderson was excluded from Constitution Hall because her skin was black, what more moving place could there be for her great concert than the Lincoln Memorial? When hundreds of thousands came to protest against the war in Vietnam, it seemed fitting and natural that the march should proceed along the Mall.

The parks are, in sum, a special national treasure, subject to many different sorts of uses. That is why the question of what powers the government has to regulate them is, inevitably, a grave issue of public law. The Secretary of the Interior is under a special mandate from Congress to manage the competing uses of these parks and to maintain them so as to fulfill their manifold purposes. It is a task that requires both sensitivity and common sense; it raises some questions of genuine difficulty. But from the beginning of this regulatory enterprise, every Secretary of the Interior has, without any difficulty, concurred in one starting place: nobody should be allowed to *live* in these parks. The Memorial-core area parks are not suitable for camping. They are too small, too fragile, too crowded and too sacred to be taken over as anyone's living quarters; nobody may sleep over in Lafayette Park or the Mall.

It is in the face of this longstanding and unanimously maintained rule that respondents sought permission from the National Park Service to conduct a demonstration in Lafayette Park and the Mall to protest the plight of the homeless. The demonstration was to last the entire winter, and respondents proposed to establish campsites where 150 demonstrators would sleep in some 60 tents for the three-month period of the demonstration. The National Park Service pointed out that the proposal plainly violated the regulations prohibiting camping—de-

fined as "the use of the park land for living accommodation purposes." Indeed, it is difficult to imagine a proposal more at odds with the regulatory prohibition: the demonstrators desired to live in Lafayette Park and the Mall for three months precisely in order to demonstrate that they have no other place to live. Consequently, the demonstration permit issued by the Park Service expressly prohibited respondents from using the parks as a place to sleep. The Park Service did, in accordance with the regulations—and in what was an attempt to accommodate First Amendment values as sensitively as possible—grant a renewable seven-day license to respondents to demonstrate on a 24-hour basis and to erect "symbolic" campsites.

On these facts, a narrow majority of the court of appeals, in a remarkable disarray of divergent opinions, held that the regulations may not be enforced against respondents because to do so would violate their First Amendment right to freedom of speech.

Our central submission is simple: the First Amendment does not give respondents the right to use Lafayette Park and the Mall as sleeping quarters. In fact, until this case, we would have thought that simple common sense would make that an unchallengable assertion. And if one then proceeds to review the various factors that are relevant to the question whether government regulation is or is not valid under the First Amendment, common sense is resoundingly confirmed: the First Amendment does not guarantee respondents the right to sleep in the Memorial-core area parks.

A. *No important First Amendment values are served by the activity respondents wished to engage in and the government sought to regulate.* We urge the Court to rule that respondents' proposal to be allowed to sleep in the Memorial-core parks does not qualify as "symbolic speech" protected by the First Amendment.⁷ Further, even if sleeping is an activity that is thought somehow

⁷ See *United States v. O'Brien*, 391 U.S. 367, 376 (1968).

to implicate the First Amendment, we ask the Court to recognize that the claim for constitutional protection is weak and weighs lightly in any constitutional balancing.

(1) The sleep-in respondents proposed for themselves does not constitute "speech"—in the everyday sense of oral or written communication—at all. Whatever might be thought about Judge Scalia's attempt in this case (see Pet. App. 78a-87a) to demonstrate that the First Amendment does not provide full protection to conduct, only speech, surely the language of the amendment at least suggests that its core concern is for such verbal communication. We start, then, with the undisputable fact that what the government wished to prohibit in this case lies at the outer margins, rather than the center, of First Amendment concerns.

(2) But the point is broader than the simple one that what respondents proposed to do was not, in a literal sense, speech at all. For we do not dispute the proposition that conduct, as well as words, can communicate—that acts can be powerful carriers of ideas. But not all conduct, not all acts, carry identical expressive power. And, on that continuum, sleep ranks very low. Few acts are less expressive in and of themselves than sleep. It is obvious to all that the wearer of a black armband or one who displays a flag with a peace symbol on it intends to communicate opinions and ideas.⁸ But nobody would normally suppose that a person asleep at night is, by that act, proposing to convey a message. People sleep at night because they are sleepy and need sleep. For sleep to become the conveyor of a message, an elaborate array of further extraneous instruction and explanation is needed.

The point is, of course, relevant to the sleep-in proposed by respondents. The fact of 150 people being asleep at night in tents in Lafayette Park communicates, by itself, no ideas at all—just that these people are sleepy.

⁸ See *Tinker v. Des Moines School District*, 393 U.S. 503 (1969); *Spence v. Washington*, 418 U.S. 405 (1974).

The activity does not possess intrinsic expressive power. To convert sleep into what the court of appeals denominated as "expressive sleep," a great deal of elaborate and extrinsic explanation (illuminated placards? recorded messages broadcast on a loudspeaker?) would be required so that passersby would understand that the sleepers were sleeping in order to make a point.

In sum, even conceding the somewhat farfetched notion that sleep can, on occasion, be an activity that conveys a message, it is a remarkably unpowerful method of communication. Accordingly, a ban on sleeping in the park does not interfere with activity that is an important *form* of First Amendment activity; it does not materially impoverish the repertoire of means for the communication of ideas and opinions.

(3) The fact that sleep is not expressive unless a great deal of other surrounding and explanatory "speech" activity takes place symptomizes another relevant matter: forbidding sleep only trivially constrained the ability of these demonstrators to make their point. The permit respondents obtained left them a huge space for the exercise of First Amendment rights. They were free to come and stay on a continuous 24-hour basis, to march, and sing and make speeches. They could tell all who would listen that they were there to demonstrate that they had no home; the only thing they could not do was to add that they were "sleeping" there (rather than just "being" there) because they had nowhere else to sleep. The incremental value—the additional power—that would be imparted to their message by the fact that they could actually sleep in the park seems trivial.

(4) Finally, the fact that sleep is activity all of us constantly engage in for nonexpressive purposes, and is virtually never engaged in for expressive purposes, creates another problem if First Amendment protection is to be accorded. How are we to distinguish between expressive and nonexpressive sleep? The person who wears the black armband or displays the flag can be assumed

to be sincere when he claims that he wishes to express some message; there is no nonexpressive reason to wear a black armband or display a flag and no reason to pretend to be doing it for an expressive purpose. But in the case of conduct such as sleep, some people may claim that they want to camp in the Mall for expressive purposes when in fact they just want to camp in the Mall—and there is no way to tell one group from the other without inquiring into the sincerity of the person claiming First Amendment protection. But allowing that very inquiry to be made by a licensing authority is itself threatening to First Amendment values. On the other hand, the alternative—to allow anyone to camp in Lafayette Park who simply claims to wish to engage in expressive camping—is equally unpalatable. The dilemma illuminates the difficulties we get into if we artificialize our conception of what constitutes “expressive” conduct by extending it to quotidian activities and ordinary bodily functions that everyone engages in every day for non-expressive purposes. In fact, a reading of the various opinions supporting the judgment below provides a painful lesson in these difficulties: none of the opinions even begins to succeed in telling us how the Park Service is to distinguish “expressive” from “non-expressive” sleep.

In sum: on every relevant scale, respondents’ desire to sleep in Lafayette Park and the Mall can only marginally further the purposes of the First Amendment in protecting the people’s right to communicate opinions and ideas; no important First Amendment values are implicated by a general prohibition on sleeping in these parks.

B. *The bar on using the Memorial-core parks as sleeping quarters serves important public interests and is well adapted and narrowly tailored to serve those interests while safeguarding First Amendment concerns.* Under the tests laid down by this Court in its cases passing on the validity of “time, place and manner” restrictions (see *United States v. Grace*, No. 81-1863 (Apr. 20, 1983)), as well as under the standard posited by *United*

States v. O'Brien, 391 U.S. 367 (1968), the "no camping" regulation is valid on its face and as applied.

(1) The rule that nobody is allowed to use Lafayette Park and the Mall as sleeping quarters seems so obviously sensible that it appears patronizing to provide elaborate explanation. Even assuming that every one of those demonstrators would scrupulously comply with the associated rules (no fires, no cooking, no digging of latrines, etc.), it is evident that to allow 150 demonstrators to live in these crowded areas for three months would create a significant strain on their resources and on the resources of the services charged with their maintenance and safekeeping. Indeed, respondents' proposal that they be permitted to sleep in these parks for the winter months seems to us to constitute a gross overreaching, an attempt to monopolize these unique places that are visited by millions of Americans and used by them for a multitude of different purposes.

(2) Even more important, the threat to the preservation of the beauty and serenity of these parks created by the decision of the court of appeals cannot be limited to these demonstrators and their demonstration. Under that decision, it is difficult to see how the Park Service can—without engaging in content-based inquiries prohibited by the First Amendment—resist any claim asserting First Amendment protection for using Lafayette Park and the Mall to sleep in. The point is explicitly highlighted by Judge Mikva's statement (Pet. App. 18a) that not only the homeless, but all who have a grievance against the government (such as "opposition to the nuclear arms race") have a constitutional right to sleep in Lafayette Park and the Mall. And Judge Edwards' (supposedly reassuring) suggestion (Pet. App. 39a)—that the Constitution may perhaps permit the government to institute a first-come first-served system and impose time limits—vividly (if inadvertently) conveys the nature of the threat: Lafayette Park and the Mall will have been converted into camping grounds devoted to the

project of "expressive sleeping" by all comers who wish or pretend to wish to engage in that activity.

(3) The public interest the government seeks to protect in this case—the preservation of these unique parks so as to fulfill their special and manifold purposes—has nothing to do with the suppression of communication; it is not designed to restrict speech. The National Park Service was not here engaged in suppressing supposedly dangerous or disruptive ideas (prohibition on black arm-bands)⁹ or promoting orthodox ones (punishing those who efface patriotic slogans on license plates).¹⁰ The regulations are wholly content-neutral; indeed—unlike regulations dealing with loudspeakers and handbilling¹¹—they have almost no foreseeable effect on free expression at all. The government is, simply, trying to assert the modest notion that Lafayette Park and the Mall are not suitable for camping.

(4) The government's prohibition in this case is well-adapted and narrowly tailored to the end of preserving these parks for their unique and multifarious uses. The prohibition on sleep-overs in the Memorial-core parks is flat and uniform, not susceptible to arbitrary application and—as found by the district court (Pet. App. 96a-99a, 106a-108a)—evenhandedly applied in fact.¹² On the other hand, the regulations go far to accommodate First Amendment interests; in fact, they go well beyond the line that, in our opinion, the First Amendment commands. There were no "time or place" restrictions placed on respondents at all: they were expressly permitted to set up a 24-hour vigil and were even permitted to erect "symbolic campsites." Thus, the prohibition against sleep in no way narrowed respondents' potential audience or substantially inhibited the force of their message.

⁹ See *Tinker v. Des Moines School District*, *supra*.

¹⁰ See *Wooley v. Maynard*, 430 U.S. 705 (1977).

¹¹ See *Kovacs v. Cooper*, 336 U.S. 77 (1949); *Schneider v. State*, 308 U.S. 147 (1939).

¹² Cf. *Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969).

(5) It is true, without doubt, that allowing the demonstrators to sleep in Lafayette Park and the Mall would have made it more convenient for them to demonstrate and, perhaps, attracted some demonstrators who would otherwise stay away (or go away short of three months). But the First Amendment does not require the public to furnish demonstrators with facilities and support services designed to maximize the effectiveness of their protest.¹³

In sum: on every relevant scale, the public interest is well served—and First Amendment values hospitably accommodated—by the regulations at issue in this case, which do no more than give recognition to the fact that Lafayette Park and the Mall are not suitable for use as campgrounds.

ARGUMENT

I. NO SIGNIFICANT FIRST AMENDMENT VALUES ARE SERVED BY GIVING RESPONDENTS THE RIGHT TO USE THE MEMORIAL AREA PARKS AS SLEEPING QUARTERS

A. The Act Of Sleeping Has Such Limited Communicative Power That It Should Be Accorded Little Or No First Amendment Protection

The cornerstone of respondents' challenge to enforcement of the "no camping" regulation is that sleeping in Lafayette Park and on the Mall as part of their winter-long demonstration constitutes a form of "symbolic speech" that should be treated for First Amendment purposes as indistinguishable from conventional verbal (oral and written) communication. We submit, on the other hand, that respondents' project of sleeping in these parks does not seriously implicate the First Amendment's purpose to protect the people's right to communicate.

1. *This Court's cases show that activities such as sleep, which have minimal expressive content, should be pre-*

¹³ See *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 647 (1981).

sumed not to qualify as "symbolic speech" for purposes of the First Amendment. The fundamental issue in this case is whether the First Amendment's guarantee of "freedom of speech" gives the respondents a constitutional right to sleep in Lafayette Park and the Mall.¹⁴ This Court has recognized that the purpose of the First Amendment is to protect the people's right to communicate—to express thoughts and ideas and emotions—and that, consequently, non-verbal activity ("conduct") that is significantly communicative may deserve First Amendment protection as "symbolic speech." See, e.g., *Tinker v. Des Moines School District*, 393 U.S. 503 (1969) (black armband). But the Court has firmly rejected the notion that "an apparently

¹⁴ Twelve years ago, in a litigation also involving the "right" to use the Memorial-core area parks as sleeping quarters, this Court apparently recognized that this issue does not present a substantial question: a neutral regulation against the use of the park for a living accommodation may be enforced without violating the First Amendment even if demonstrators wish to sleep as part of their demonstration.

In 1971, the United States District Court for the District of Columbia issued an injunction prohibiting the Vietnam Veterans Against the War from, inter alia, camping overnight on the Mall as part of a proposed demonstration. *A Quaker Action Group v. Morton*, C.A. No. 688-69 (D.D.C. Apr. 16, 1971). (A detailed summary of this litigation is set forth in *Vietnam Veterans Against the War v. Morton*, 506 F.2d 53, 56 n.9 (D.C. Cir. 1974).) The district court defined the term "overnight camping" as "sleeping activities, or making preparations to sleep (including the laying down of bedrolls or other bedding) * * *," which corresponds to the language of the current regulation. The court of appeals modified that order to permit the demonstrators to use their symbolic campsite 24 hours a day "as an incident to or as part of their public demonstrations and gatherings, and for the purpose of sleeping in their own equipment, such as sleeping bags, on that portion of the Mall." *A Quaker Action Group v. Morton*, No. 71-1276 (D.C. Cir. Apr. 19, 1971). The following day the Chief Justice vacated the court of appeals' order and reinstated the prohibitory order of the district court. The full court, without dissent, then upheld the Chief Justice, vacated the court of appeals' order permitting sleeping, and reinstated "with full force and effect" the injunction of the district court. *Morton v. Quaker Action Group*, 402 U.S. 926 (1971).

limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." *United States v. O'Brien*, 391 U.S. 367, 376 (1968). See also *Spence v. Washington*, 418 U.S. 405, 409 (1974); *Cohen v. California*, 403 U.S. 15, 18 (1971); *Tinker v. Des Moines School District*, 393 U.S. at 515 (White, J., concurring). If respondents' proposed sleep-in does not constitute "speech" as discussed in *O'Brien*, their challenge to the "no camping" regulation must fail. It is obvious that the First Amendment is not violated by a content-neutral regulation that serves valid public interests unrelated to expression and that has no incidental impact on "speech."

a. The Court has not had occasion to draw a definitive line separating conduct that should be considered "symbolic speech" from other conduct.¹⁵ Nor does this case require the Court to create a comprehensive formulation. Wherever the line between protected and unprotected ac-

¹⁵ Judge Scalia's dissent below (Pet. App. 78a-87a) suggests that full First Amendment protection, which entails a strong degree of protection against abridgment of expression even when it is incidentally caused by neutral government regulations directed at furthering interests unrelated to the regulation of expression, should be extended only to traditional forms of speech, such as spoken or written communications. He suggests that other forms of expressive conduct are protected only against government regulation that is directed at suppressing expression (*id.* at 78a-79a). Along similar lines, a noted constitutional law commentator has written that the distinction between "expression" and "action" is critical to First Amendment analysis and that "symbolic speech" cases must be analyzed in terms of whether the conduct is predominantly "expression" or "action." See T. Emerson, *The System of Freedom of Expression* 17-18, 79-88, 718 (1970). This distinction has been criticized as rigid and unworkable by other commentators. See, e.g., Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 Harv. L. Rev. 1482, 1494-1495 (1975). Even those commentators who are critical of this distinction, however, seem to recognize that not all action is protected by the First Amendment. See, e.g., Henkin, *The Supreme Court, 1967 Term—Foreword: On Drawing Lines*, 82 Harv. L. Rev. 63, 80 (1968).

tivity ultimately is drawn, it seems apparent that—if the Court's statement in *O'Brien* is to be meaningful at all—respondents' proposal to use the Memorial-core area parks as a place to sleep during the winter should not qualify as "speech" to be protected by the First Amendment.

The central point is that respondents' claim for First Amendment protection differs fundamentally from claims that have been given serious consideration by this Court in other "symbolic speech" cases. See *Spence v. Washington*, *supra* (affixing peace symbol to flag); *Tinker v. Des Moines School District*, *supra* (black armband); *United States v. O'Brien*, *supra* (draft card burning); *Brown v. Louisiana*, 383 U.S. 131 (1966) (sit-in in segregated library); *Stromberg v. California*, 283 U.S. 359 (1931) (flying red flag). Each of those cases involved conduct that was inherently expressive; there was no reason to engage in the conduct other than the desire to communicate, and there was no doubt that the activity conveyed a powerful message understandable to those who observed. This is vividly shown by the fact that in each case the conduct constituted the complete demonstration; there was no need, in order to communicate the ideas, to use words to explain the conduct. The reciprocal truth recognized in these cases was, of course, that—with the exception of *O'Brien* (where the challenged statute was upheld)—it was the purpose of the challenged legislative or regulatory action to restrict or regulate the expression of ideas. See *Spence v. Washington*, 418 U.S. at 414 n.8; *Tinker v. Des Moines School District*, 393 U.S. at 508-510; *Brown v. Louisiana*, 383 U.S. at 142; *Stromberg v. California*, 283 U.S. at 361, 369; see generally Pet. App. 84a (opinion of Scalia, J.).

The activity involved in this case is quite different. The fact of 150 demonstrators sleeping in tents in Lafayette Park or the Mall, standing by itself, communicates no ideas, no opinions, no emotions—only the fact that people are asleep. It is not like 150 demonstrators with flags or armbands. It is not even like 150 demonstrators standing at night in a vigil with candles lit—a demonstra-

tion obviously designed to express some sort of protest or feeling or aspiration (even if it is hard, without an explanation, to know what is its particular concern). Sleeping is a singularly inexpressive activity—it communicates primarily the bodily need to sleep.¹⁶ It is virtually never engaged in to convey a message or make a point, and it will not be understood as conveying a message or making a point without elaborate extrinsic explanation. In fact, even if an observer understood from other indications that this was a demonstration site, he would most likely conclude simply that respondents were camping at the site for convenience, not that the act of sleeping was *itself* designed to convey a message.¹⁷ That is why respondents could not rely on sleep alone to constitute their demonstration; the sleep was to be part of an elaborate program designed to explain their message verbally (see Pet. App. 16a-17a).

What we have here, then, is a proposed method of communication that is singularly unpowerful: without inherent expressive potential, requiring elaborate verbal

¹⁶ We put to one side, as not involved in this case, situations where one engages in an activity that is illegal or forbidden in order to demonstrate the invalidity or immorality of the prohibition. That is the "problem" of civil disobedience; the expressive nature of the conduct in that case comes from the fact that it is prohibited, and it is irrelevant whether the activity is otherwise expressive. Cf. *United States v. O'Brien*, *supra*; *Brown v. Louisiana*, *supra*. Obviously, the simple act of sitting in the forward seats of a bus is powerfully expressive, if an unjust and invalid law tells you not to do so because your skin is black. But no problem of this sort is involved here. There is no claim that respondents were seeking to protest against an unjust regulatory prohibition, and that they sought to arouse observers to *that* injustice. Thus, the legal and moral issues raised by the problem of civil disobedience need not concern the Court here.

¹⁷ Professor Henkin, who argues strongly for an inclusive definition of "symbolic speech," seems to contemplate that the relevant conduct should be capable of becoming a "common comprehensible form of expression." Henkin, *The Supreme Court, 1967 Term—Foreword: On Drawing Lines*, 82 Harv. L. Rev. 63, 80 (1968). Sleeping obviously does not meet this standard.

explanation to convey any message at all. And the reciprocal truth is that a prohibition on this activity will have only a marginal impact on respondents' ability to convey a message and only a marginal impact on the means to be used for conveying it. For respondents are not forced to engage in verbal explanations *instead* of sleeping; they would have to explain anyway, even if allowed to sleep.

b. The plurality below obscures the weakness of the speech interest involved in this case by concluding that respondents' sleeping satisfies a "test" for First Amendment protection that it finds in *Spence v. Washington*, *supra* (Pet. App. 14a-15a; see also *id.* at 34a-35a (opinion of Edwards, J.)). No such test exists. In *Spence* the Court held that it violates the First Amendment to punish a person for displaying a flag with a peace symbol attached—that this was a "case of prosecution for the expression of an idea through activity." 418 U.S. at 411. The Court stressed that flags are a traditional "form of symbolism" recognized by all—a "'shortcut from mind to mind'" (*id.* at 410, quoting *Board of Education v. Barnette*, 319 U.S. 624, 632 (1943)). It noted that the peace symbol, too, is just that—a symbol known to all, just like the black armband that, in *Tinker*, "conveyed an unmistakable message" (418 U.S. at 410). The Court went on to state that the context of Spence's action in May 1970—at the time of the invasion of Cambodia and the tragedy at Kent State—also made the fact that he was conveying a message, as well as the content of the message, unmistakable (*ibid.*). In summarizing this part of its opinion, the Court concluded that "[a]n intent to convey a particularized message was present, and in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it" (*id.* at 410-411).

Respondents, like the plurality below, abstract this last statement and convert it, out of context, into a "test" for the "symbolic speech" inquiry (see Br. in Opp. 20). But this statement was not designed to be a "test" at all, and

a fortiori not to be a complete one. *Spence* rested substantially on Spence's use of symbols with obvious and powerful communicative meanings. See 418 U.S. at 410. It is a giant step from this to the conduct involved here—conduct that has no recognized communicative content and that is constantly engaged in by every human on earth—but virtually never for any communicative purpose at all.¹⁸

In fact, this is one of the few cases where conduct alleged to be communicative cannot even satisfy respondents' own "test" for what is "symbolic speech." Respondents may have intended to convey a particular message through their sleep-in; but "the likelihood * * * that the message would be understood by those who viewed it" can hardly be characterized as "great" (418 U.S. at 411). This fact was implicitly recognized by respondents, who planned to use placards and speeches to explain the significance of their conduct, and by the plurality, which clearly recognized that these explanations would be necessary to the understanding of respondents' message (see Pet. App. 15a).¹⁹

c. The weakness of the speech interest at stake in this case is also demonstrated by the fact that the prohibition imposed by the government has only a trivial impact on respondents' ability to communicate their message. The National Park Service has permitted respondents to demonstrate at the times and in the places requested; nothing the government has done in any way limits their

¹⁸ The formulation mistakenly characterized by respondents as the "*Spence* test" has been criticized by several commentators on the ground that it is so overinclusive. Actions such as assassination of political figures and the bombing of government buildings by groups who admit responsibility can fairly be characterized as intended to convey a message that is readily perceived by the public. See, e.g., L. Tribe, *American Constitutional Law* 586 n.6 (1978); Ely, *supra*, at 1495 n.53.

¹⁹ See Note, *Symbolic Conduct*, 68 Colum. L. Rev. 1091, 1117 (1968) ("the necessity for an accompanying statement may serve to negate the communicative significance of the conduct").

audience. Respondents can speak and march and sing and pray; they can stand in silent vigil or broadcast to the world in order to convey the message of homelessness. They can even spend the night; what they cannot do is to go into their tents and spend the night actually sleeping—because that would be using the park as a place to live. It is this gap, and this alone, that leads to the claim that the Constitution has been violated, on the asserted (but surely dubious) basis that the message would be more effective if respondents were permitted actually to go to sleep in their tents.²⁰

d. To summarize: our submission is that the concept of “symbolic speech” should be reserved for forms of “conduct” that can contribute meaningfully to the expressive communication of ideas, opinions and emotions; and that that concept should not be promiscuously expanded to ordinary bodily activities such as sleeping—activities that every human being engages in every day of life without intending thereby to convey a message.²¹

²⁰ Even if this implausible assertion were true, it does not describe a substantial “speech” interest; it is black letter law that the First Amendment does not give one an absolute right to deliver a message in the precise manner claimed by the demonstrator to be most effective. See, e.g., *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 647 (1981); *Adderley v. Florida*, 385 U.S. 39, 47-48 (1966).

²¹ We urge the Court to adopt a presumptive rule that sleeping is not sufficiently communicative to qualify for First Amendment protection, in order to leave the door open to the (largely theoretical) possibility that there may exist some contexts in which an activity such as sleeping can convey a message with sufficient expressive power to be readily understood. A regulation designed to suppress that expression would be subject to First Amendment scrutiny even if, on its face, it affected only common activity not ordinarily classified as speech; First Amendment values are always implicated when the government seeks to suppress or regulate communication. But all that is far afield from this case: the sight of respondents sleeping in their tents cannot be said to communicate anything at all to the passerby who is not also independently and elaborately briefed by ordinary verbal means about the intended message, and there can be no serious suggestion that the “no camping” regulation is directed in any way at expression.

The First Amendment places special value on our right to *communicate*, to express what we think. The notion of a First Amendment right to engage in "expressive sleep"—the constitutional right conjured up by the court of appeals in this case—trivializes the First Amendment, because it can contribute only in a trivial way to the possibilities of human communication.

2. *Even if not categorically ruled out as a variety of "symbolic speech," sleeping constitutes activity at the margins of First Amendment concerns; since its weight in the balance is light, its regulation is valid if reasonable.* Even if this Court is unwilling to adopt a categorical presumption that sleeping is not conduct protected by the First Amendment as "symbolic speech," the considerations advanced above—showing that sleeping is a singularly unimportant form of First Amendment activity—are not irrelevant. The weakness of the First Amendment claim in this case means that, in any balancing, the weight to be accorded to the (so-called) "speech" interest is slight and is more easily counterbalanced than in cases where First Amendment values are substantially in play. This Court's decisions make it clear that, in balancing First Amendment values against the government interest in regulation, the extent to which First Amendment values are actually implicated is highly relevant, so that the degree of First Amendment protection may differ depending on the nature of the affected speech and on the form of expression involved. See, *e.g.*, *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 501 & n.8 (1981) (plurality opinion); *id.* at 527-528 (opinion of Brennan, J.); *id.* at 557 (Burger, C.J., dissenting); *Elrod v. Burns*, 427 U.S. 347, 363 n.17 (1976) (opinion of Brennan, J.); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 557 (1975) ("Each medium of expression, of course, must be assessed for First Amendment purposes by standards suited to it."); *Cox Broadcasting Co. v. Cohn*, 420 U.S. 469, 495 (1975); *Cohen v. California*, 403 U.S. 15, 18 (1971). What this means, in effect, is that the marginal

First Amendment values involved in this case can be fully protected without subjecting the government's regulatory enterprise to the sort of exacting scrutiny that is conventionally called for when the government regulates truly communicative activity.

In part II of this brief, we show that in fact the public interest in enforcing the National Park Service's ban on sleeping in Lafayette Park and the Mall is substantial. But first we explain why the court of appeals' approach to the question whether "speech" was involved in this case at all (and, if so, what sort of speech interest was involved) is fundamentally flawed.

B. The Court Of Appeals' Overinclusive Approach To What Constitutes "Symbolic Speech" Is Analytically Flawed And Contradicts This Court's Cases

The opinions in the court of appeals struggle mightily—but, we submit, unsuccessfully—to show that what is at stake here—the right of respondents to spend three months camping in Lafayette Park and the Mall—constitutes a significant speech interest within the meaning of the Constitution.

In analyzing the question whether—and what sort of—"speech" interest is involved in this case, the court of appeals was led to overinclusiveness by at least four significant errors in its analysis.

1. As we have already demonstrated (see pages 23-24, *supra*), the court was led to an unduly broad definition of protected speech by its mistaken adoption (see Pet. App. 15a), as a wooden "test," of a standard derived from one sentence taken out of context from the opinion in *Spence v. Washington*, *supra*.

2. The court of appeals went further astray in applying this overinclusive "test." Having quoted the Court's statement in *Spence*, the plurality made no inquiry into the question whether there is a "great likelihood" that respondents' plan to sleep in the parks would in fact be readily perceived as communicative. Rather, the plurality

immediately jumped to the conclusion that "[i]n the present case, within the context of a large demonstration with tents, placards, and verbal explanations, the communicative context is sufficiently clear that the participant's *sleeping cannot be arbitrarily ruled out of the arena of expressive conduct*" (Pet. App. 15a (footnotes omitted; emphasis supplied)).

It is apparent that this approach sweeps all before it: conduct can be excluded from the category of "expressive conduct" only if it is permissible to rule it out "arbitrarily." But what conduct is that? And is it not the case that literally any conduct, when explained with "placards and verbal explanations," can, on this approach, be rendered sufficiently "communicative"?

This Court made it unmistakably clear in *O'Brien* that not all conduct may be labeled "speech" simply because the actor intends thereby to convey a message. The court of appeals (Pet. App. 13a) paid lip service to this injunction, but deprived it of all meaningful content in concluding that the First Amendment protects as "speech" all conduct which, when explained by placards and verbal explanations, is sufficiently understandable to resist being "arbitrarily" excluded from the "arena of expressive conduct."

3. The court of appeals does not stop here. Judge Mikva's opinion further expands the concept of speech by eliminating the requirement that the conduct in question have any inherent communicative value at all (Pet. App. 17a):

We add, moreover, that even were we not to focus on the peculiarly expressive nature of sleeping, first amendment scrutiny would still be implicated. This conclusion stems from the fact that the protestors' purpose, whether asleep or awake, is to maintain 'a symbolic [24-hour] presence * * *.' * * * Given this undeniable intent * * * it is clear that CCNV's proposed 'presence' is intended to be expressive regardless of whether the demonstrators sit down, lie down,

or even sleep during the course of the demonstration. Thus, whatever the particular form of the protestors' presence at night, their presence itself implicates the first amendment.

Apparently, then, protestors who wish to demonstrate around the clock have a constitutionally protected right to engage in any activity necessary to enable them to stay around the clock, regardless of whether the activity itself conveys a message. See also *Pet. App. 47a* (opinion of Ginsburg, J.).²² And the plurality makes it explicit that camping in the park is a constitutional right no matter what the purpose of the demonstration (*e.g.*, to protest the nuclear arms race), so long as the protestors deem an around-the-clock presence to be important (and therefore "expressive") (*id.* at 18a). But this principle cannot, of course, be limited to sleeping. Under it a right to cook and serve food—for example—must plainly be classified as a First Amendment right so long as it bears a "functional relationship" (*id.* at 47a (opinion of Ginsburg, J.)) to the demonstrators' around-the-clock expressive presence.

4. The court of appeals made one other fundamental error. Having once found that, in the circumstances, respondents' proposed camping constituted "speech" within the coverage of the First Amendment, the court immediately brought into play the doctrines providing for highly rigorous scrutiny of governmental regulation of speech—just as if the government had, here, prohibited respondents from making ordinary speeches and passing out leaflets in the park (*cf. Pet. App. 45a* (opinion of Ginsburg, J.) (voicing misgivings about treating sleeping as the equivalent of ordinary speech)). Having found that respondents have a toe-hold on the "speech" side of the scale, the court went on to evaluate the "government interest" side of the scale as if all speech interests had an

²² Chief Judge Robinson and Judge Wright disassociated themselves from this aspect of the plurality opinion. See *Pet. App. 31a*.

identical weight, without inquiring into the seriousness of the constraints on communication created by the ban on sleeping.

Ignoring the strength of the speech interest involved is surely a peculiar way of engaging in what the court of appeals correctly termed a *balancing* of First Amendment freedoms against the government's interest in regulation. See Pet. App. 19a; see generally L. Tribe, *American Constitutional Law* 581-582, 683 (1978); *Metromedia, Inc. v. City of San Diego*, 453 U.S. at 502 (plurality opinion); *Linmark Associates, Inc. v. Willingboro*, 431 U.S. 85, 91 (1977); *Konigsberg v. State Bar*, 366 U.S. 36, 50-51 (1961). One cannot balance without assessing the weights on both sides of the scales. Particularly if "speech" is to be defined on the undiscriminating basis adopted by the court of appeals, so as to include virtually every sort of conduct, it is critically important that distinctions between different forms of speech—carrying vastly different First Amendment weights—be kept in mind in evaluating whether a sufficient countervailing interest has been shown to justify regulation.

In conclusion, we submit that this is not a difficult case. No important First Amendment values are served by inventing a constitutional right for respondents to sleep in Lafayette Park and the Mall; the fact that respondents may not sleep there is not a significant intrusion into the free marketplace of ideas. Even if respondents' sleep-in triggers some First Amendment scrutiny, the substantial public interest in the "no camping" regulation—to which we now turn—clearly justifies enforcing it.

II. THE BAN ON CAMPING IN THE MEMORIAL PARKS SERVES A SIGNIFICANT PUBLIC INTEREST AND DOES NOT THREATEN FIRST AMENDMENT VALUES

A. Under This Court's Balancing Test The "No Camping" Regulation Is Amply Justified As A Content-Neutral Measure Narrowly Tailored To Serve An Important Public Purpose Unrelated To The Suppression Of Free Expression

Perhaps the most important aspect of the "no camping" regulation is not what the regulation does, but what it does not do. This Court has stated that "above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter or its content." *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95 (1972). See also *Carey v. Brown*, 447 U.S. 455, 470 (1980). The regulation at issue here is in no way directed at expression.²³ It must, therefore, be common ground that the regulation is not subject to the strictest form of First Amendment scrutiny; it need not be supported by a "compelling state interest." See, e.g., *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 786 (1978). Rather, the challenge to the regulation—based on its alleged incidental intrusion into rights of free expression—must be evaluated by balancing the government interest served by enforcing the regulation against the speech interest allegedly infringed. See generally L. Tribe, *American Constitutional Law*, 580-584, 682-684 (1978); Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 Harv. L. Rev. 1482, 1484, 1488-1490 (1975).

²³ The fact that the interest underlying the regulation is unrelated to expression is alone sufficient to distinguish this case from *Spence v. Washington*, *supra*, where the Court expressly found that the only conceivable justification for the statutory restriction was to regulate expression. 418 U.S. at 414 n.8; see also *Consolidated Edison Co. v. Public Service Commission*, 447 U.S. 530, 541 n.10 (1980).

Two lines of cases suggest an appropriate framework for conducting this balancing inquiry. Lafayette Park and the Mall are concededly "public forums" appropriate for use for the public communication of ideas. The limits on the government's power to regulate expression in a public forum are well established. The government "may enforce reasonable time, place, and manner regulations as long as the restrictions 'are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.'" *United States v. Grace*, No. 81-1863 (Apr. 20, 1983), slip op. 5 (quoting *Perry Education Ass'n v. Perry Local Educator's Ass'n*, No. 81-896 (Feb. 23, 1983), slip op. 7-8).²⁴ This doctrinal framework is appropriate here because the "no camping" regulation—if it has any impact on expression—clearly regulates only its manner. Pursuant to the regulations, respondents have been issued a permit entitling them to demonstrate in the parks. But the manner in which they may demonstrate is restricted—they are not permitted to express their message by using their demonstration site as sleeping quarters.

The court of appeals looked to a different line of authority in considering the validity of the regulation. It applied the test set forth in *United States v. O'Brien*, *supra*. *O'Brien* involved the prosecution of a person for publicly burning his draft card on the courthouse steps, thus violating a federal statute prohibiting the knowing destruction of draft cards. Assuming *arguendo* that *O'Brien's* conduct was protected "speech," the Court stated (391 U.S. at 377):

[W]e think it clear that the government regulation is sufficiently justified if it is within the constitu-

²⁴ See also *United States Postal Service v. Council of Greenburgh Civic Associations*, 453 U.S. 114, 132 (1981); *id.* at 136 (Brennan, J., concurring in the judgment); *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. at 647-648; *Consolidated Edison Co. v. Public Service Commission*, 447 U.S. at 535-536; *Grayned v. City of Rockford*, 408 U.S. 104, 115-119 (1972).

tional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

The Court held that this test was met and affirmed O'Brien's conviction, emphasizing that "both the governmental interest and the operation of the [statute] are limited to the noncommunicative aspect of O'Brien's conduct" (*id.* at 381-382).²⁵

We believe that the language quoted from *Grace* and *O'Brien* indicates a convergence toward a single framework for inquiry. Both cases insist, first, that the regulation not constitute censorship—that it be content-neutral (*Grace*) or not have as its purpose the suppression of free expression (*O'Brien*). Second, both cases ask whether the public interest served by the regulation is "important or substantial" (*O'Brien*) or "significant" (*Grace*). Third, both cases require that the government regulation be well adapted so as to "further" the relevant government interest, and that the regulation not intrude with unnecessary breadth into the arena of free expression. *Grace* puts the point by stating that the regulation must be "narrowly tailored" to serve the government interest, and then adds the congruent injunction that alternative channels of communication must be left open. *O'Brien* states the "narrowness" requirement by insisting that the restriction on speech may not be "greater than is essential" to serve the government's interest.²⁶

²⁵ The Court explained that "the continuing availability to each registrant of his Selective Service certificates substantially furthers the smooth and proper functioning of the system that Congress has established to raise armies" (*id.* at 381), and that a law prohibiting the destruction of draft cards "specifically protects this substantial government interest" (*ibid.*).

²⁶ We do not believe that the *O'Brien* "no greater than is essential" test requires the government to do more than to demonstrate

We turn now to a detailed analysis of this case within this framework, an analysis that demonstrates that under this Court's cases the ban on camping in the Memorial-core parks is constitutional.

1. *The regulation is a content-neutral nondiscriminatory prohibition wholly unrelated to the suppression of expression.* No elaborate demonstration is needed of the undisputed point that the government's age-old policy against overnight camping in Lafayette Park and the Mall has nothing to do with censorship and is in no way animated by the purpose of suppressing free expression. The government has not decided here that some or all ideas are dangerous, or that some ideas are better than others. Indeed, it requires considerable ingenuity to figure out how the government's regulation has in any way intruded on free expression; the more natural reaction would be to say that respondents' demonstration was accorded a remarkably generous welcome. Respondents were given permission to demonstrate around the clock in a small and fragile area revered by Americans and belonging to all, at the center of the symbolic heart of

that the regulation is "narrowly tailored" to serve a significant government interest. This is shown by the way in which the Court applied that test in *O'Brien* itself when it upheld the challenged statute as an "appropriately narrow means of protecting" the government interest in maintaining the availability of draft cards (391 U.S. at 382). In a later case the Court has paraphrased the *O'Brien* test in terms indistinguishable from the "time, place, and manner" formulation, stating that "the regulation must be *narrowly drawn* to avoid unnecessary intrusion on freedom of expression." *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 69 n.7 (1981) (emphasis added). Indeed, the Court apparently has classified *O'Brien* as indistinguishable from other "time, place, and manner" cases. See *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976). Because it applies only to enactments that are "unrelated to the suppression of free expression" (391 U.S. at 377), it makes no sense for the *O'Brien* test to incorporate an extremely strict degree of scrutiny. See generally *Consolidated Edison Co. v. Public Service Commission*, 447 U.S. at 540 n.9; *Ely, supra*, at 1484-1485; *L. Tribe, American Constitutional Law* 685 (1978) ("relaxed scrutiny").

the city and the country. Their audience would be exactly the audience they themselves chose to have. All that has happened is that respondents were not allowed to use their demonstration site as sleeping quarters.²⁷

Nor does the structure of this regulation invite content-based or discriminatory enforcement: the ban on sleeping in the park is flat and absolute, leaving no room for discretionary judgments about the supposed dangers of particular communications. Cf. *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 153 (1969); *Kunz v. New York*, 340 U.S. 290, 293-294 (1951); *Cantwell v. Connecticut*, 310 U.S. 296, 304-307 (1940).²⁸

2. *The regulation serves an important government interest—the preservation of the parks for multifarious uses.* Lafayette Park and the Mall—integral parts of the Memorial-core—constitute a special national resource. The National Park Service discharges an important mission in administering these parks and regulating their use for the benefit of the general public. As is explained in detail in the policy statement accompanying the 1982 revision of the “no camping” regulations (47 Fed. Reg. 24299, 24301-24302), these particular regulations are an essential part of the overall regulatory scheme to preserve park resources for the enjoyment of all.

In the judgment of the National Park Service, the Memorial Core area parks are “an especially unsuitable location for camping activities” (47 Fed. Reg. 24302 (1982)). These are small urban parks, visited by mil-

²⁷ We repeat—see note 20, *supra*—the point that even if the ban on sleep reduces the effectiveness of respondents’ message (a dubious proposition), no violation of the First Amendment occurs; the Amendment does not guarantee an individual the right to engage in what he considers to be the most effective way to communicate. See, e.g., *Heffron v. Society for Krishna International Consciousness, Inc.*, 452 U.S. at 647.

²⁸ The district court unequivocally rejected the suggestion that the regulation has been enforced in a discriminatory fashion (Pet. App. 106a-108a), and none of the judges on the court of appeals took issue with that portion of its holding.

lions yet meticulously landscaped, unable to accommodate long stays. The use of these parks as campgrounds would be "basically incompatible" with their important natural functions. See *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 75 (1981) (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 116-117 (1972)). As described in the relevant policy statement, "[c]amping could cause significant damage to park resources, create serious sanitation problems, and seriously tax law enforcement resources." 47 Fed. Reg. 24302 (1982).

In addition, allocating park lands to individuals for use as living quarters excludes others. The Memorial-core parks are small. They are used by multitudes, both residents and visitors,²⁹ who come to see and stroll and play and pray. Some of these seek not noise and conflict but serenity and inspiration. The rights of *all* must be accommodated. In these circumstances, the notion that a portion of Lafayette Park and the Mall should become living space for respondents for the three winter months seems completely out of proportion, and would—as the Park Service has determined—deprive "other park visitors * * * of use of this nationally significant space." 47 Fed. Reg. 24302 (1982).

Further, it must be remembered that the government interest involved in this case is not limited to these respondents and their demonstration. If respondents have a constitutional right to engage in "expressive sleep," so do others. And, as a reading of the opinions in the court of appeals shows, the question of how to distinguish between "expressive" and "non-expressive" sleep is not easily answered. In fact, as Judge Wilkey demonstrates (Pet. App. 71a-77a), there is no way for the National Park Service to draw a line that would permit "sleeping demonstrations" without leaving it effectively powerless to prevent anyone from using Lafayette Park and the Mall as sleeping quarters.

²⁹ It has been estimated that, by 1985, 29 million people will visit the Mall annually. *History of the Mall, supra*, at 98.

It is a fundamental principle under the First Amendment the government should not use content as a basis for regulating speech or expression. See, e.g., *Police Dep't of Chicago v. Mosley*, 408 U.S. at 95; *Niemotko v. Maryland*, 340 U.S. 268, 271 (1951). Many demonstrators—indeed, many casual visitors to Washington—may have an interest in camping on the Mall.³⁰ It is a simple matter for anyone to assert a facially valid First Amendment claim to sleep there, one that would plainly satisfy the plurality's test for constitutional protection.³¹ The National Park Service would be forced to grant per-

³⁰ The plurality states that not many people are interested in camping on the Mall in the dead of winter (Pet. App. 24a). But the decision in this case must obviously be more than a winter's tale; a constitutional right to sleep in the park can hardly be limited to cold times.

³¹ The plurality states that demonstrators wishing to use the parks as sleeping quarters "should be held to no higher standard than the advancement of a plausible contention that their conduct is intended to, and in the context of their demonstration likely will, express a message" (Pet. App. 16a). Given the plurality's conclusion that sleeping can be treated as expressing a message because it facilitates the demonstrators' "presence" at the demonstration site, it will be a rare demonstrator who is unable to meet this standard. Even if it is required that the sleeping itself be expressive (see Pet. App. 31a (opinion of Robinson, C.J. and Wright, J.)), it would not be difficult for campers to concoct a facially valid First Amendment justification. As Judge Wilkey notes (Pet. App. 74a-77a), groups might propose to camp on the Mall to protest the high cost of hotel accommodations in Washington or to dramatize the absurdity of the court of appeals' decision in this case. Applications for permits to engage in camping for these reasons would meet the court of appeals' standard and presumably would have to be granted by the National Park Service. Respondents' characterization of these First Amendment claims as "frivolous" (see Pet. App. 74a) provides no solution. That is a judgment on which reasonable persons may differ; some persons might well characterize in the same terms respondents' own claimed First Amendment right to sleep. Cf. Pet. App. 78a, 87a (opinion of Scalia, J.). The point is that it is not the National Park Service's business, nor should it be, to examine the content of proposed demonstrations and to assess whether they are "frivolous."

mits to these individuals to sleep in the park unless it is to investigate the permit requests to determine whether the First Amendment claim is sincere. Such an inquiry—in addition to being beyond the scope of the Service's proper function—would seriously threaten First Amendment values. It would require the government to assess the motivations of demonstrators and to make judgments about the plausibility of the connection between the proposed camping activity and the message sought to be conveyed.³² It is, consequently, clear that the government interest involved in this case cannot be limited to the protection of the parks from the effects of the demonstration proposed by these respondents. Rather, the question is whether there is a significant public interest associated with preventing Lafayette Park and the Mall from being converted into places available for use as around-the-clock campgrounds by all comers who wish to use them for living accommodations for their convenience or pleasure and who present a facially valid claim to be allowed to engage in “expressive sleep.” Our submission is that the answer must be “yes”; that to allow this to happen would be tragic; and that the notion that the Constitution requires it to happen is absurd.

3. *The regulation is well adapted to serve the relevant government interests and is narrowly tailored to be no wider than necessary; the regulation leaves ample scope for free expression.* It is the use of the parks as living quarters that the Secretary of the Interior has identified as threatening the preservation of park resources. The regulation is narrowly focused to that end. “Camping” is defined as “the use of park land for living accommodation purposes.” 36 C.F.R. 50.27(a). The inclusion

³² The plurality casually states that “[i]t would seem an entirely permissible distinction to permit sleeping that is expressive as part of a twenty-four hour vigil, but not to permit sleeping that is a mere convenience to daytime demonstrators” (Pet. App. 25a). How the National Park Service is actually supposed to draw this distinction on the basis of permit applications is left to the imagination.

of sleep as one of the acts associated with use of the park as a living accommodation—the portion of the regulation attacked by respondents—is surely appropriate. Sleeping outdoors is a central constituent of camping—it's what it's all about. What converts an outing or a hike or a picnic into camping is the project of *living* outdoors; living outdoors means to sleep there. A definition of camping that failed to include sleeping would be bizarre.³³

The inclusion of sleep in the definition of camping directly serves the public interest in protecting park resources. It makes it more difficult to maintain a continuous presence in the park, to occupy it around the clock. The parks are not closed at night, and the regulations (and the permit issued here) interpose no bar to an around-the-clock demonstration. As Judge Wilkey explains (Pet. App. 67a n.49, 74a-75a), there is a significant quantitative difference, in terms of the threat to park resources, between permitting a wakeful vigil and permitting demonstrators to use the park as a place to sleep. Both involve a continuous, around-the-clock presence in the park; but once sleeping is allowed, the number of persons who can stay for 24 hours is greatly increased, with a corresponding increase in the wear and tear on park resources.

As we have already shown, the regulation as written and applied is scrupulously restricted to interfere minimally (if at all) with respondents' right to propagate a message. See pages 24-25, 34-35, *supra*. Respondents have been permitted to maintain a 24-hour presence. They have been permitted to erect "symbolic" campsites so that they can demonstrate that the point of their protest is homelessness. Their right to communicate by real First

³³ It should be noted that the regulation does not prohibit sleep as such; it focuses only on sleep that manifests a purpose to use the park land for living accommodation purposes. Napping that occurs outside of this context is not prohibited. See 47 Fed. Reg. 24301 (1982).

Amendment activities—word and song, speech and writing—is inviolate. Under the circumstances the asserted infringement on their ability to communicate their message seems more theoretical than real.

Finally, as has also been previously shown (pages 36-38, *supra*), and as is fully elaborated in Judge Wilkey's dissent (Pet. App. 71a-77a), the "no camping" regulation cannot be criticized as overbroad because it fails to provide an exception for "expressive" sleeping. The short answer to such criticism is that any such exception would either wholly swallow the rule, or would inevitably engulf the Park Service—and the courts—in generating and applying content-oriented lines for distinguishing between expressive and nonexpressive sleep.

We conclude, therefore, that—whether the *O'Brien* formulation or the standard "time, place, and manner" test is used—the flat ban on camping in the Memorial parks is valid.³⁴

B. The Court Of Appeals Failed Properly To Evaluate The Government Interest In Preventing Camping In The Memorial Area Parks

The court of appeals majority was not persuaded that, as applied in this case, the "no camping" regulation sufficiently and narrowly serves a significant public interest. But in reaching that conclusion the three principal opinions supporting the judgment below mischaracterize and distort the nature of the government interest at stake here. Each of those opinions placed heavy emphasis on the fact that the government has *not* prohibited respond-

³⁴ The point can be put in the precise language of *O'Brien*: "[B]ecause of the Government's substantial interest in * * * [prohibiting use of the parks for living accommodation purposes], because [a ban on camping] is an appropriately narrow means of protecting this interest and condemns only the independent noncommunicative impact of conduct within its reach, and because the noncommunicative impact of [respondents' proposal to live in the park] frustrate[s] the Government's interest, a sufficient governmental interest has been shown to justify [the regulation]." See 391 U.S. at 382.

ents from holding their demonstration, from maintaining a 24-hour presence in the parks, from erecting symbolic campsites, and even from lying down and taking catnaps in these symbolic tents. But instead of commending the government for the narrowness of the resulting prohibition, the opinions turn the permissive features of the regulations against the government. Judge Mikva focuses on the "incremental" harm to the parks that can be caused by these specific demonstrators (who have received a permit to demonstrate around the clock and to erect tents) if they also engage in the "incremental" act of falling asleep in their tents. He concludes that no serious additional mischief will be caused by sleeping (Pet. App. 21a-24a). Judge Ginsburg complains that "it is not a rational rule of order to forbid sleeping while permitting tenting, lying down, and maintaining a twenty-four hour presence," and concludes that the lines drawn by the National Park Service are not sufficiently "sensible, coherent, and sensitive to the speech interest involved" (*id.* at 48a). Judge Edwards takes a different tack. His question is whether there are alternative, less restrictive, means available to achieve the purpose of the "total ban against sleeping"—a ban that, Judge Edwards asserts, counts as a "total prohibition on the exercise of a constitutional right" (*id.* at 38a). He concludes that less restrictive alternatives are available that would adequately serve the relevant government interests (*id.* at 39a).

We believe that the methods of analysis used in these opinions are flawed and ignore the relevant commands of this Court's cases.

1. *The court of appeals misunderstood the point of the government's regulations and therefore mischaracterized the government interest involved in this case.* The government in this case seeks to prevent persons from camping—that is, using the parks as living quarters. It is that use that is considered most threatening to the proper utilization and preservation of these spaces. The regulations consequently do not forbid many activities that are *not*

constituents of camping—activities such as strolling, sunbathing, and lying down. In fact the regulations do not prohibit sleeping as such—they prohibit sleeping in the context of using the park as a place to live. (That is why catnapping is not prohibited.)³⁵

The court of appeals never addressed the question whether it is “important” (Judge Mikva) or “sensible” (Judge Ginsburg) to forbid the use of Lafayette Park and the Mall as a living accommodation, and whether it is possible and meaningful to do that without denying respondents the right to sleep overnight in their tents. Instead, it disaggregated the government’s prohibition and examined in isolation the one specific constituent of that activity—sleeping—that respondents sought to include in their demonstration. This distorted its analysis and enabled it to invalidate the regulation by a technique of “divide and conquer.” Obviously, the “incremental” harm caused by one narrow element necessary to carry on a complicated activity can be easily minimized even though the activity as such is significantly harmful. The question still remains whether forbidding the activity is or is not important. What the government seeks to prevent here is the monopolization of and strain on park resources that results from the continuous and intense use that we call “camping” or “living” in a place—a use that cannot occur without sleeping. It is simply irrelevant to the validity of that aim that sleep—as such—is not a

³⁵ The question whether it is “important” or “sensible” to prohibit sleeping (in the abstract) while allowing catnapping (in the abstract) is, consequently, an irrelevant and artificial question. The National Park Service has concluded that using the park as living quarters—including, in that context, sleeping—is more threatening to and less appropriate for Lafayette Park and the Mall than the taking of an occasional casual snooze. This seems like an eminently sensible judgment; and it is unaffected by the fact that sleeping and catnapping seem alike in the abstract and that in any one case the additional “harm” to the park from allowing the snoozer to spend the night asleep seems small.

"harmful" activity,³⁶ or that forbidden sleep is not significantly different—in the abstract—from permitted wakeful lying down or catnapping.

2. *The importance of the government's "no camping" regulation is not diminished by the fact that the government has been sensitive to First Amendment interests in its generous treatment of respondents' proposed demonstration.* The question that remains—if, in principle, there is a substantial government interest in preventing persons from "living" in Lafayette Park and the Mall—

³⁶ In fact, the court of appeals is wrong even in the context of its own analysis. Not many people are up to the austerities of all-night vigils. But allowing people to sleep overnight in tents will multiply their numbers and will allow each one to stay longer. Obviously this will create new and heavy pressures on the resources of Lafayette Park and the Mall. (The court of appeals' plurality stated that "allowing an all-night presence by wakeful protestors would seem to tax sanitation facilities, law enforcement personnel, and the park resource itself to a greater extent than would allowing those same protestors simply to sleep" (Pet. App. 23a). This evidently assumes that giving permission to sleep will have no effect on the number of persons using the park around the clock and no effect on how long such a person will remain there.) From the viewpoint of the proper use of these parks, it makes no sense whatever to promulgate a rule that camping is prohibited in Lafayette Park and then to provide—as the court of appeals in effect did—that camping is nevertheless permitted as long as the campers promise to cook elsewhere.

In fact, the "divide and conquer" tactics inherent in the court of appeals' "incremental" analysis portends ill also for the remaining elements of the Park Service's regulations. If respondents have a constitutional right to sleep in the park, they can surely make the same claim next year for the right to cook and store their possessions there (a case of "expressive" cooking and storing to demonstrate that they have no home in which to cook and store their possessions). And the court of appeals is unlikely to find that a substantial "incremental" governmental interest is served by preventing demonstrators (who are, by hypothesis, spending the nights exercising their constitutional right to sleep in Lafayette Park) from cooking there and from storing their things in their (no longer) "symbolic" tents.

is whether the Constitution demands that that rule be abandoned in the case of demonstrators who have been given permission to stay around the clock and to erect symbolic tents. The court of appeals' conclusion that the regulation is invalid *because* the government has gone to these lengths to accommodate First Amendment values seems peculiarly perverse: it tells the government to be as stringent as possible in dealing with demonstrations, permitting only what the Constitution inexorably commands. It is made doubly perverse by the fact that the permitted activities that the court of appeals found so significant have been permitted in part on account of requirements imposed by prior decisions of that very court.³⁷ In effect what the court of appeals has done here is to hold (in Case 1) that the law requires the government to permit demonstrations around the clock and the erection of symbolic tents, and then to hold (in Case 2) that sleeping must be permitted because a 24-hour presence and tenting are allowed—on the ground that the “incremental” harm caused by the “incremental” act of sleeping is not great (Judge Mikva) or that the line between tenting and sleeping is not “sensible” (Judge Ginsburg). It is this technique that Judge Wilkey correctly characterized as one that “nickel[s] and dime[s] [the] regulation to death” (Pet. App. 64a).

Even more important, the court of appeals' analytical technique is not a sound way to create rules of constitu-

³⁷ The regulations authorize the use of temporary structures such as symbolic tents in line with the decision in *Women Strike for Peace v. Morton*, 472 F.2d 1273 (D.C. Cir. 1972), and a settlement of litigation in that case. 36 C.F.R. 50.19(e)(8). By the same token, respondents were permitted to remain in the park without time restrictions as part of their demonstration in part because of the court of appeals' prior recognition of a First Amendment right to conduct an around-the-clock vigil. See *United States v. Abney*, 534 F.2d 984 (D.C. Cir. 1976); see also *A Quaker Action Group v. Morton*, 516 F.2d 717, 734 (D.C. Cir. 1975) (striking down existing limitation on length of demonstrations).

tional law. The question in this case is whether the *Constitution* gives respondents the right to use the Memorial-core parks as sleeping quarters. The fact that the government has—rightly or wrongly—chosen to allow 24-hour vigils and “symbolic” campsites should not distort the correct disposition of that question. Permissions and concessions granted by government officials should not be converted into baseline touchstones for constitutional adjudication.³⁸

In fact, of course, the government has never in any way conceded or assumed that the provisions of the regulations allowing around-the-clock demonstrations and the erection of symbolic campsites are required by the Constitution. The regulations are framed as they are because the government, in an attempt to be hospitable to First Amendment values, determined to accede without further litigation to the requirements imposed in previous circuit cases. Their rulings should not be deemed to provide the constitutional starting point for the decision of this case.

3. *The court of appeals' plurality also misconceived the nature of the government's interest in enforcing the “no camping” regulation by focusing entirely on these particular demonstrators.* The plurality in this case further narrowed its focus in evaluating the nature and weight of the public interest behind the “no camping” regulation by reducing the issue to that presented by these specific demonstrators and their particular demonstration. Its ultimate holding was that the government's interest would

³⁸ Nor will it do to conclude that it is not “sensible, coherent, and sensitive” to draw a distinction between tenting and sleeping (Pet. App. 48a (opinion of Ginsburg, J.)). No provision of the Constitution gives the courts a general reviewing power to invalidate regulations because a judge feels they are based on distinctions that are not sufficiently “sensible, coherent, and sensitive.”

not be sufficiently furthered "by keeping *these* putative protestors from sleeping" (Pet. App. 28 (emphasis added)). But in *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 652 (1981), this Court explained that the justification for a regulation of general applicability cannot be assessed by inquiring into the effect of granting an exemption from the regulatory prohibition to one group. Any regulation can be made to seem unnecessary if the inquiry is focused only on the government interest in not making an exception in the particular case at hand. See, e.g., *United States Postal Service v. Council of Greenburgh Civic Associations*, 453 U.S. 114, 135 (1981) (Brennan, J., concurring). The plurality acknowledged this in theory (see Pet. App. 22a), but it evaded meaningful compliance with the rule by adopting an artificial definition of the relevant "general" category.³⁹

We submit that this analysis is unsound. The National Park Service is under a duty to promulgate general regulations for the preservation of park resources. Surely it must be free to act with the generality of cases in mind without thereby rendering the regulation vulnerable in every individual situation in which a compelling need for the particular restriction cannot be shown. See, e.g.,

³⁹ The plurality never made a meaningful attempt to analyze the category of persons who would be entitled to sleep in the park as a result of its ruling. Instead it stated that the government's interest in enforcing the regulation is to be assessed in terms of its impact on "all individuals or groups similarly situated to [respondents]," defined as "all those who wish to engage in sleeping as part of their demonstration and have been granted renewable permits to demonstrate on a twenty-four hour basis on sites at which they have been allowed to erect temporary symbolic structures" (Pet. App. 22a). The plurality justified this artificial (and essentially circular) focus on the basis of the dubious assertion that "[t]he interests of people who do not possess a permit are simply not at issue in this case" (*ibid.*). It is clear that the plurality assumed that the relevant category was very small.

United States Postal Service v. Council of Greenburgh Civic Associations, 453 U.S. at 132-133. Otherwise, challenges to the regulations would lead to chaos and arbitrary treatment, rather than uniformity, fairness, and ease of administration. Since the regulating agency must draw lines, the court's inquiry must focus on whether those lines, drawn for the generality of cases, are reasonably (and narrowly) tailored to serve the relevant government interest. That standard is satisfied here. The government has a strong interest in preventing all comers from camping in Lafayette Park and the Mall by using them as living quarters. It makes no sense to forbid camping without forbidding its central necessary constituent: sleeping overnight in tents. No intelligible exception can be carved out for "expressive" camping, and no special exception can or should be made for these particular demonstrators.

4. *The court of appeals misapplied O'Brien when it concluded that less restrictive alternatives are available.* A further flaw in the court of appeals' approach to this case resulted from its misunderstanding of this Court's statement in *O'Brien* that an incidental restriction on First Amendment freedom may be "no greater than is essential to the furtherance of that [governmental] interest" (391 U.S. at 377). Both the plurality and Judge Edwards read this as authorizing the courts to make a wholly independent de novo assessment whether there exists a means "less restrictive" than the regulation to further the government's objective (Pet. App. 23a, 39a). Both opinions conclude from this that the regulation must fall if the court can conceive of a somewhat different regulatory scheme that may be protective of the parks even if respondents are permitted to sleep there. The plurality suggests that patrolling the campsites closely to prevent cooking and making fires (*id.* at 23a-24a), revoking the demonstration permit if "participants engage in non-sleep 'camping' activities" (*id.* at 26a n.32), and limiting "the number of tents, the size of tents or

campsites, and the number of persons allowed to sleep" (*id.* at 27a (footnotes omitted)) constitute less restrictive alternatives. Judge Edwards also lists these as alternatives, and adds that the Park Service may "perhaps prevent any individual from sleeping in the parks beyond a specified, successive number of hours or days" (*id.* at 39a).

Our submission is that *O'Brien* does not contemplate this kind of ad hoc regulatory supervision over the details of an administrative scheme. In fact this Court has warned that "[t]he logic of * * * elaborate less-restrictive-alternative arguments could raise insuperable barriers to the exercise of virtually all [regulatory] powers" (*United States v. Martinez-Fuerte*, 428 U.S. 543, 557 n.12 (1976)), since "[a] judge would be unimaginative indeed if he could not come up with something a little less 'drastic' or a little less 'restrictive' in almost any situation" (*Illinois Elections Board v. Socialist Workers Party*, 440 U.S. 173, 188 (1979) (Blackmun, J., concurring)).⁴⁰

Whatever scrutiny may be appropriate when the government seeks to regulate or limit expression, it is clear that in cases like this one (and *O'Brien*)—where the challenged regulation is "unrelated to the suppression of free expression" (*United States v. O'Brien*, 391 U.S. at 377)—government regulation should not be vulnerable to the free-floating judicial revision exemplified in the approach of the court of appeals.⁴¹ It is the Secretary of

⁴⁰ On the analysis adopted by the court of appeals, the conviction in *O'Brien* itself would surely have been reversed, for the smooth functioning of the draft could have been assured by more systematic government record-keeping without prohibiting the expressive activity of burning draft cards. See Ely, *supra*, at 1487-1488.

⁴¹ As we have already suggested (see note 26, *supra*), we read the fourth prong of the *O'Brien* test as the equivalent of one aspect of the familiar "time, place, and manner" test—that government regulations that incidentally impinge on speech must be "narrowly tailored" to accomplish their intended purpose. The government may not use an elephant to swat a fly. But the *O'Brien* test was

the Interior, and not the court of appeals, that has been entrusted with the responsibility to formulate the regulations designed to safeguard the Memorial parks for their multifarious uses. Every Secretary seized of the question has concurred that it is sensible to bar all camping in these parks. The suggestion that the purposes of that bar would be adequately served by the "close patrol" of camping sites and the initiation of permit-revocation procedures if illegal cooking is discovered seems to us mistaken;⁴² but in any event, the matter is one for prudential judgment, not constitutional adjudication.⁴³

not intended to give the courts the power to decide that a fifteen inch flyswatter must be used rather than a sixteen inch one because it is "less restrictive." The question for the court is whether the government has adopted a regulatory scheme that fairly and substantially matches ends and means, not whether the court can conjure up a set of detailed regulations that, in the court's opinion, are a shade more liberal than the government's.

⁴² In adopting the existing regulation, the National Park Service found that "[e]xperience with administering the court's decision [in *CCNV I*] allowing sleeping has revealed that sleeping activity by demonstrators expands to include other aspects of living accommodations such as the storage of personal belongings and the performance of necessary functions which have converted the sleeping area into actual campsites." 47 Fed. Reg. 24301 (1982).

There is no reason to be confident that respondents' demonstration will be an exception. When respondents conducted their similar, much smaller, "model" demonstration in the winter of 1981-1982, their "expressive sleep" (Pet. App. 26a) not surprisingly spilled over into other camping activities specifically proscribed by the regulations. The district court found that respondents hung blankets over trees in Lafayette Park and consumed food and stored personal belongings at the demonstration site (Pet. App. 96a).

⁴³ Indeed, one wonders why Judges Mikva and Edwards assumed so easily that rules limiting the numbers of tents and tenters and the duration of their demonstrations would be *less* restrictive than a rule prohibiting sleeping. (Compare Pet. App. 47a-48a & n.14 (opinion of Ginsburg, J.), referring to these suggestions as imposing controls "tighter than those now in effect.") Under the methodology of the court of appeals, a regulation limiting the

In sum, the regulatory prohibition against camping in Lafayette Park and the Mall is a reasonable and narrowly tailored measure designed to preserve these unique and beautiful places. There is no adequate substitute for this general and eminently sensible prohibition. And since the regulation creates no serious threat to First Amendment values, there should be no constitutional impediment to its enforcement.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

REX E. LEE

Solicitor General

J. PAUL McGRATH

Assistant Attorney General

PAUL M. BATOR

Deputy Solicitor General

ALAN I. HOROWITZ

Assistant to the Solicitor General

LEONARD SCHAITMAN

KATHERINE S. GRUENHECK

Attorneys

DECEMBER 1983

number of demonstrators (50?) or the length of an around-the-clock demonstration (one week?) would certainly be vulnerable to a "least restrictive alternative" attack.

APPENDIX

CONSTITUTIONAL AND REGULATORY
PROVISIONS INVOLVED

The First Amendment provides in pertinent part:

Congress shall make no law * * * abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

36 C.F.R. 50.27(a) provides:

Camping is defined as the use of park land for living accommodation purposes such as sleeping activities, or making preparations to sleep (including the laying down of bedding for the purpose of sleeping), or storing personal belongings, or making any fire, or using any tents or shelter or other structure or vehicle for sleeping or doing any digging or earth breaking or carrying on cooking activities. The above-listed activities constitute camping when it reasonably appears, in light of all the circumstances, that the participants, in conducting these activities, are in fact using the area as a living accommodation regardless of the intent of the participants or the nature of any other activities in which they may also be engaging. Camping is permitted only in areas designated by the Superintendent who may establish limitations of time allowed for camping in any public camping ground. Upon the posting of such limitations in the campground no person shall camp for a period longer than that specified for the particular campground.

36 C.F.R. 50.19(e) (8) provides:

In connection with permitted demonstrations or special events, temporary structures, [sic] may be erected for the purpose of symbolizing a message or

meeting logistical needs such as first aid facilities, lost children areas or the provision of shelter for electrical and other sensitive equipment or displays. Temporary structures may not be used outside designated camping areas for living accommodation activities such as sleeping, or making preparations to sleep (including the laying down of bedding for the purpose of sleeping), or storing personal belongings, or making any fire, or doing any digging or earth breaking or carrying on cooking activities. The above-listed activities constitute camping, when it reasonably appears, in light of all the circumstances, that the participants, in conducting these activities, are in fact using the area as a living accommodation regardless of the intent of the participants or the nature of any other activities in which they may also be engaging. Temporary structures are permitted to the extent described above, provided prior notice has been given to the Director, except that:

(i) No structures shall be permitted on the White House sidewalk.

(ii) All such temporary structures shall be erected in such a manner so as not to unreasonably harm park resources and shall be removed as soon as practicable after the conclusion of the permitted demonstration or special event.

(iii) The Director may impose reasonable restrictions upon the temporary structures permitted, in the interest of protecting the park areas involved, traffic and public safety considerations, and other legitimate park value concerns.

(iv) Any structures utilized in a demonstration extending in duration beyond the time limitations specified in paragraphs (e) (4) (i) and (ii) of this section must upon 24 hours notice be capable of being removed and the site restored or the structure

3a

secured in such a fashion so as to not unreasonably interfere with use of the park area by other permittees authorized under this section.

(v) Individuals or groups of 25 persons or less demonstrating under the small group permit exemption of § 50.19(b)(1) shall not be permitted to erect temporary structures other than small lecterns or speakers platforms. This provision is not intended to restrict the use of portable signs or banners.

No. 82-1998

Office - Supreme Court, U.S.

FILED

FEB 1 1984

L. STEVAS.

CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1983

WILLIAM P. CLARK,
SECRETARY OF THE INTERIOR, *ET AL.*,
v. *Petitioners,*

COMMUNITY FOR CREATIVE NON-VIOLENCE,
ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENTS

BURT NEUBORNE
CHARLES S. SIMS
American Civil Liberties Union
Foundation, Inc.
132 West 43rd Street
New York, New York 10036

*LAURA MACKLIN
Institute for Public Representation
600 New Jersey Avenue, N.W.
Washington, D.C. 20001
(202) 624-8390

ARTHUR B. SPITZER
ELIZABETH SYMONDS
American Civil Liberties Union
Fund of the National Capital Area
600 Pennsylvania Avenue, S.E.
Washington, D.C. 20003

Of Counsel:

ARLENE S. KANTER

*Counsel of Record

QUESTIONS PRESENTED

(1) Whether respondents' act of sleeping outdoors in a public place in the dead of winter to convey the plight of homeless people is sufficiently expressive to warrant First Amendment protection; and if so, (2) whether petitioners have failed to demonstrate a sufficiently substantial interest to justify suppressing it.

TABLE OF CONTENTS

	<u>Page</u>
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	21
ARGUMENT:	
INTRODUCTORY STATEMENT	28
I. RESPONDENTS' COMMUNICATIVE ACTIVITY IS CENTRAL TO A PORTRAYAL OF THE PLIGHT OF THE HOMELESS AND IS, THUS, IMBUED WITH SUFFI- CIENT EXPRESSIVE CONTENT TO QUALIFY FOR PRESUMP- TIVE FIRST AMENDMENT PROTECTION	37
A. This Court Has Repeatedly Recognized the Protected Nature of Symbolic Expres- sion	38
B. Respondents' Attempt to Portray the Plight of the Homeless by Sleeping in the Dead of Winter in a Highly Public Place Is a Form of Symbolic Expression	45

II. SUPPRESSION OF RESPONDENTS' COMMUNICATIVE ACTIVITY IS NOT NECESSARY TO PROTECT AN IMPORTANT GOVERNMENTAL INTEREST	57
A. The Standard of Review in First Amendment Cases Is Designed to Minimize the Improper or Unnecessary Suppression of Expressive Activity	63
B. Permitting Respondents' Demonstration Activity Will Not Compromise Petitioners' Ability to Enforce an Effective Ban on Camping in the Memorial Core Parks	74
C. Permitting Respondents' Communicative Activity Will Not Impair Any Governmental Interests	83
III. RESPONDENTS' PROPOSED ACTIVITY IS NOT CAMPING WITHIN THE MEANING OF 36 C.F.R. PART 50	90
CONCLUSION	93

TABLE OF AUTHORITIES

	<u>Page</u>
<u>CASES:</u>	
<u>A Quaker Action Group v.</u> <u>Morton</u> , 516 F.2d 717 (D.C.Cir. 1975)	87
<u>Abrams v. United States</u> , 250 U.S. 616 (1919)	64
<u>Addington v. Texas</u> , 441 U.S. 418 (1979)	69
<u>Brandenburg v. Ohio</u> , 395 U.S. 444 (1969)	63, 64
<u>Broadrick v. Oklahoma</u> , 413 U.S. 601 (1973)	59, 60
<u>Brown v. Louisiana</u> , 383 U.S. 131 (1966)	<u>passim</u>
<u>Brown v. Socialist Workers</u> <u>1974 Campaign Committee</u> <u>(Ohio)</u> , 103 S. Ct. 416 (1982)	60
<u>Buckley v. Valeo</u> , 424 U.S. 1 (1976)	60
<u>Cameron v. Johnson</u> , 390 U.S. 611 (1968)	41
<u>Cohen v. California</u> , 403 U.S. 15 (1971)	63
<u>Community for Creative Non-</u> <u>Violence v. Watt</u> , 670 F.2d 1213 (D.C.Cir. 1982)	7, 91

<u>Community for Creative Non-Violence v. Watt</u> , 703 F.2d 586 (D.C.Cir. 1983)	<u>passim</u>
<u>Cox v. Louisiana</u> , 379 U.S. 536 (1965)	41
<u>Doran v. Salem Inn, Inc.</u> , 422 U.S. 922 (1975)	43
<u>Eastern Railroad Presidents Conference v. Noerr Motor Freight</u> , 365 U.S. 127 (1961)	81-82
<u>Edelman v. Jordan</u> , 415 U.S. 651 (1974)	87
<u>Edwards v. South Carolina</u> , 372 U.S. 229 (1963)	<u>passim</u>
<u>Federal Election Commission v. Hall-Tyner Election Campaign Committee</u> , 678 F.2d 416 (2nd Cir. 1982)	60-61
<u>Gitlow v. New York</u> , 268 U.S. 652 (1925)	65
<u>Goesaert v. Cleary</u> , 335 U.S. 464 (1948)	70
<u>Grayned v. City of Rockford</u> , 408 U.S. 104 (1972)	30
<u>Gregory v. City of Chicago</u> , 394 U.S. 111 (1969)	<u>passim</u>
<u>Hague v. CIO</u> , 307 U.S. 496 (1939)	30-31

<u>Heffron v. International Society for Krishna Consciousness, Inc., 452 U.S. 640 (1981)</u>	<u>passim</u>
<u>In re Winship, 397 U.S. 358 (1970)</u>	69-70
<u>Kotch v. Board of River Pilot Comm'rs, 330 U.S. 552 (1947)</u>	70
<u>Lovell v. Griffin, 303 U.S. 444 (1938)</u>	66
<u>Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981)</u>	87
<u>Minneapolis Star and Tribune Co. v. Minnesota Comm'r of Revenue, 103 S. Ct. 1365 (1983)</u>	73
<u>Morton v. A Quaker Action Group, 402 U.S. 926 (1971)</u>	87
<u>NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982)</u>	33
<u>Niemotko v. Maryland, 340 U.S. 268 (1951)</u>	66
<u>Railway Express Agency, Inc. v. New York, 336 U.S. 106 (1949)</u>	70
<u>Rosenberg v. Fleuti, 374 U.S. 449 (1963)</u>	93

<u>Santosky v. Kramer</u> , 455 U.S. 745 (1982)	69
<u>Schad v. Borough of Mt. Ephraim</u> , 452 U.S. 61 (1981)	29, 43, 49
<u>Schenck v. United States</u> , 249 U.S. 47 (1919)	64
<u>Schneider v. State</u> , 308 U.S. 147 (1939)	66
<u>Sherbert v. Verner</u> , 374 U.S. 398 (1963)	81
<u>Southeastern Promotions, Ltd. v. Conrad</u> , 420 U.S. 546 (1975)	43
<u>Spence v. Washington</u> , 418 U.S. 405 (1974)	<u>passim</u>
<u>Street v. New York</u> , 394 U.S. 576 (1969)	63, 64
<u>Stromberg v. California</u> , 283 U.S. 359 (1931)	29, 39, 44
<u>Terminiello v. Chicago</u> , 337 U.S. 1 (1949)	89
<u>Thornhill v. Alabama</u> , 310 U.S. 88 (1940)	41, 66-67
<u>Tinker v. Des Moines School District</u> , 393 U.S. 503 (1969)	<u>passim</u>
<u>United Mine Workers v. Pennington</u> , 381 U.S. 657 (1965)	81-82

<u>United States v. Abney,</u> 534 F.2d 984 (D.C.Cir. 1976)	87
<u>United States v. Berrigan,</u> 283 F. Supp. 336 (D.Md. 1968), <u>aff'd sub nom.</u> <u>United States v. Eber-</u> <u>hardt,</u> 417 F.2d 1009 (4th Cir. 1969)	54-55
<u>United States v. Clark,</u> 445 U.S. 23 (1980)	92-93
<u>United States v. Grace,</u> 103 S. Ct. 1702 (1983) ...	30, 67
<u>United States v. Guerrero,</u> 667 F.2d 862 (10th Cir. 1981)	54
<u>United States v. Malinowski,</u> 472 F.2d 850 (3rd Cir. 1973)	54
<u>United States v. O'Brien,</u> 391 U.S. 367 (1968)	44, 53
<u>United States v. Raines,</u> 362 U.S. 17 (1960)	58
<u>United States v. Seeger,</u> 380 U.S. 163 (1965)	80
<u>United States v. Thirty-</u> <u>Seven Photographs,</u> 402 U.S. 363 (1971)	93

<u>United States Postal Service v. Council of Greenburgh Civic Associations</u> , 453 U.S. 114 (1981)	31
<u>Welsh v. United States</u> , 398 U.S. 333 (1970)	80-81
<u>West Virginia State Board of Education v. Barnette</u> , 319 U.S. 624 (1943)	49
<u>Wisconsin v. Yoder</u> , 406 U.S. 205 (1972)	81
<u>Whitney v. California</u> , 274 U.S. 357 (1927)	64
<u>Williamson v. Lee Optical of Oklahoma</u> , 348 U.S. 483 (1955)	70
<u>Women Strike for Peace v. Morton</u> , 472 F.2d 1273 (D.C.Cir. 1972)	86-87
 <u>CONSTITUTIONAL PROVISIONS:</u>	
U.S. Constitution, Amendment I	<u>passim</u>
 <u>STATUTES:</u>	
50 U.S.C. App. § 456(j)	80

FEDERAL REGULATIONS:

36 C.F.R. § 50.19(b)	14
36 C.F.R. § 50.19(c)(2)	16
36 C.F.R. § 50.19(e)(5)	14, 84
36 C.F.R. §§ 50.19(e)(8) and 50.27(a)	27
36 C.F.R. §§ 50.7-50.18, 50.24-50.35, 50.39-50.45, 50.50-50.52	15

OTHER AUTHORITIES:

J. Duffield, W. Kramer, and C. Sheppard, <u>Washington, D.C.: The Complete Guide</u> at 120 (1982)	16
<u>N.Y. Times</u> , Aug. 29, 1963, at 1, col. 4	12
<u>N.Y. Times</u> , Dec. 27, 1983, at A-1, col. 1	47
<u>Washington Afro-American</u> , Aug. 31, 1963, at 1, col. 1	12
<u>Washington Daily News</u> , Feb. 12, 1978, at 5	12
<u>Washington Star</u> , March 4, 1917, at 4, col. 1	11
<u>Washington Star</u> , April 2, 1967, at A-1	13

<u>Washington Star</u> , Oct. 16, 1969, at A-1, col. 4	12
<u>Wash. Post</u> , Feb. 4, 1917, at 1, col. 1	11
<u>Wash. Post</u> , May 13, 1968, at A-1, col. 2	12
<u>Wash. Post</u> , Oct. 4, 1979, at D-11, col. 6	13
<u>Wash. Post</u> , Oct. 8, 1979, at A-23, col. 1	13
<u>Wash. Post</u> , July 5, 1980, at B-1, col. 1	13
<u>Wash. Post</u> , Sept. 1, 1981, at C-1	13
<u>Wash. Post</u> , Dec. 27, 1983, at A-1	47
<u>Wash. Post</u> , Jan. 26, 1984, at A-1, col. 1	9

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1983

No. 82-1998

WILLIAM P. CLARK, SECRETARY OF THE
INTERIOR, ET AL.,

Petitioners

v.

COMMUNITY FOR CREATIVE NON-VIOLENCE,
ET AL.,

Respondents

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS

STATEMENT OF THE CASE^{1/}

Respondents assert no constitutional right to camp in Lafayette Park or on the Mall. They do not seek to use the park or the Mall for "sleeping accommodations," "living accommodations," or "camping" purposes. In this respect, the petitioners have seriously mischaracterized respondents' request. See Petitioners' Br. at 2, 3, 11, 12.

What respondents do seek is to re-enact the central reality of homelessness, in a highly public place in the dead of winter, in order to express the message that the plight of homeless people is serious and too often ignored. As one of the homeless men seeking to demonstrate explained:

^{1/} In accordance with Rule 34.2 of the rules of this Court, this statement of the case contains only the material deemed necessary to correct inaccuracies and omissions in petitioners' statement.

Sleeping in Lafayette Park or on the Mall, for me, is to show people that conditions are so poor for the homeless and poor in this city that we would actually sleep outside in the winter to get the point across. It's a serious problem, having nowhere to sleep, no money....

Declaration of James Wilson, ¶ 8, RD 5;^{2/}
see also Second Declaration of Clarence West, ¶ 1, RD 5 (who seeks to sleep to demonstrate that he and others "have no home, no place to go").

The homeless persons in this case, and others like them, are destitute and on the street for a variety of reasons. Some are young; some are old. Many are part of families; some have recently lost their families.^{3/} Some were recently

^{2/} References to documents in the district court record are identified by record document ("RD") number. See Jt.App. at 1-3.

^{3/} See, e.g., Declaration of Clarence West, ¶ 4, RD 2.

working, but lost their jobs and ran out of money;^{4/} some have not been able to get a regular job in a long time.^{5/} Many are on the streets because of serious mental problems; many more have developed mental problems or physical ailments while struggling to survive on the streets. Each day, and each night, these people confront the same question: How, without money or resources, will I get the food, the clothing, and the shelter I must have to survive?^{6/}

These homeless people, and members of the Community for Creative

^{4/} Id., ¶¶ 4-7; see also Declaration of Monroe Kylandezes, ¶ 5, RD 2.

^{5/} See, e.g., Declaration of James Wilson, ¶¶ 1, 10, RD 5.

^{6/} See Declarations of Monroe Kylandezes, Fred Randall, and Clarence West, RD 2; and Declaration of James Wilson, RD 5.

Non-Violence^{7/} seek to demonstrate to draw public attention to the life-threatening problems the homeless face. They seek to sleep as part of their demonstration wholly for expressive purposes. They do not plan to break ground, build fires, cook or prepare food, store belongings or engage in any other activity associated with setting up camping or living accommodations, either temporary or permanent. Jt.App. at 9-15.

The homeless persons here do not need to sleep in Lafayette Park or on the Mall in order to have a temporary place to sleep. Although they lack decent shelter they can and often do scrounge sleeping space in abandoned buildings, in downtown parking garages, in deserted

^{7/} The Community for Creative Non-Violence (hereinafter "CCNV") is a religious association that supplies food, clothing shelter, and other assistance to poor and homeless persons.

doorways, on heat or steam grates, or sometimes in an emergency shelter.^{8/}

Their purpose in sleeping at the demonstration is, in James Wilson's words, "to get the point across."

Declaration of James Wilson, ¶ 8, RD 5.

As Clarence West explains:

We are out in the street dealing with it all twenty-four hours a day. There is no rest from it. That is what we are trying to show in Lafayette Park.

Declaration of Clarence West, ¶ 10, RD 2.

During the winter of 1981-82, CCNV organized a similar demonstration in which homeless people spent the night -- awake and asleep -- to dramatize the seriousness of their plight and to convey to the government and the public the fact that they were without homes or

^{8/} See, e.g., Declaration of Monroe Kylandezes, ¶¶ 7-9, RD 2.

shelter.^{9/} The demonstration, in one quadrant of Lafayette Park, was peaceful and orderly, and resulted in no damage to park property and no interference with the ability of others to use Lafayette

^{9/} The 1981-82 demonstration was permitted pursuant to court order. See Community for Creative Non-Violence v. Watt, 670 F.2d 1213 (D.C. Cir. 1982). The Court of Appeals determined:

[A]s the District Court found, in this case sleeping itself may express the message that these persons are homeless and so have nowhere else to go.... Indeed, the uncontroverted evidence in this case is that the purpose of the symbolic campsite in Lafayette Park is "primarily" to express the protestors' message and not to serve as a temporary solution to the problems of homeless persons. Thus, the only activity at issue here -- sleeping in already erected symbolic tents -- cannot be considered "camping."

Id. at 1216-17 (footnotes omitted).

Park.^{10/}

In the view of those who participated, the demonstration in the winter of 1981-82 helped to make homeless people and their problems more visible and concrete for members of the public and government officials who saw or heard about the protest.^{11/} For this reason,

^{10/} Declarations of Gabriel Leanza, ¶¶ 4-14, William Perkins, ¶ 11, and William Peters, ¶¶ 3, 7-11, RD 19.

The petitioners err in stating that sleeping during the 1981-82 demonstration by the homeless "spilled over into other camping activities." Petitioners' Br. at 49 n.42. Although petitioners cite to district court factual findings on this point, those findings -- made without an evidentiary hearing -- were sharply disputed. See Objections of Plaintiffs to Defendants' Proposed Findings of Fact and Conclusions of Law at 3-5, RD 22. There is ample evidence in the record to prove that the 1981-82 demonstration did not include "camping activities." See Declarations cited in this footnote; see also Third Declaration of Mitch Snyder (and Exs. A and B thereto), RD 19.

^{11/} Declarations of Fred Randall, ¶¶ 5-11, and Clarence West, ¶ 9, RD 2; Declaration of James Wilson, ¶ 6, RD 5; and Declarations of Gabriel Leanza, ¶¶ 6-9, 13-14, William Peters ¶¶ 5-6, and William Perkins, ¶ 10, RD 19.

members of CCNV sought permission from the National Park Service to conduct a similar demonstration beginning on the first day of winter in December, 1982. Jt.App. at 9-15. They requested and received permission for a demonstration consisting of twenty tents and fifty people in one quadrant of Lafayette Park, and forty tents and one hundred people in a large, open area of the Mall (not adjacent to any monuments). Id. at 9-17.

Both of these sites are flat areas (landscaped only with grass) that have served as the locations for many previous demonstrations and special events involving substantially larger numbers of persons, ranging from a papal mass^{12/} to a recent Washington Redskins football rally.^{13/} Neither site is, as the

^{12/} See infra note 20.

^{13/} Wash. Post, Jan. 26, 1984, at A-1, col. 1.

petitioners claim, "fragile" (Petitioners' Br. at 11, 34). Nor will either site be "crowded" (id. at 11, 16) by the number of persons proposed for the respondents' demonstration.

The historical and political significance of Lafayette Park and the Mall played an important role in the plan for the demonstration by homeless persons. As Clarence West explained:

Lafayette Park has a special significance for people like me who have grown up in D.C. We call it "Freedom Park" because over the years all the protests and demonstrations for civil rights -- for our people's freedom -- have been held in that park. The only time it was different was in 1963 when Martin Luther King was here. There were so many people we had to go over to the Mall. For me, to demonstrate in Lafayette Park or the Mall would be to carry on a long tradition of my people.

Declaration of Clarence West, ¶ 13, RD 2.

Even before Lafayette Park became an important situs of civil rights

demonstrations by Black citizens, it had provided a forum for other citizens petitioning for a redress of grievances. For example, women citizens seeking suffrage demonstrated in front of the White House in 1917.^{14/} The memorial core park areas have been the scene of memorable events that raised the public's consciousness, including Marian Anderson's 1939 concert on the steps of the Lincoln Memorial after she was refused permission to sing in Constitution Hall, and the 1963 March on Washington in which approximately 250,000 persons came to the capital, to press for greater progress toward racial and economic justice. The 1963 march culminated in Martin Luther King, Jr.'s historic "I Have a Dream" speech at the

^{14/} Washington Star, March 4, 1917, at 4, col. 1; Wash. Post, Feb. 4, 1917, at 1, col. 1.

Lincoln Memorial.^{15/} Again, in 1968 this memorial core area was the site of the "Poor People's Campaign" and "Resurrection City."^{16/} Both the Mall and the Park were also important sites for mass demonstrations protesting the Vietnam conflict,^{17/} and a variety of less-publicized demonstrations on issues of domestic and international importance.

The memorial core park areas have also served as the locations for a wide variety of special public events sponsored by the National Park Service or by private entities. Activities hosted,

15/ Washington Afro-American, Aug. 31, 1963, at 1, col. 1; N.Y. Times, Aug. 29, 1963, at 1, col. 4.

16/ Wash. Post, May 13, 1968, at A-1, col. 2.

17/ See, e.g., Washington Daily News, Feb. 12, 1978, at 5; Washington Star, Oct. 16, 1969, at A-1, col. 4.

or promoted, by the Park Service on the Mall have included annual Fourth of July concerts and fireworks displays attracting several hundred thousand persons,^{18/} large folklife festivals lasting several weeks each year,^{19/} and a 1979 papal mass which attracted over one million worshippers and onlookers.^{20/} The Park Service has also permitted an antique car show, commercial twin rotor helicopters,^{21/} weekend polo games, large troupes of performing dancers, frisbee-throwing festivals,^{22/} marathon

^{18/} See, e.g., Wash. Post, July 5, 1980, at B-1, col. 1.

^{19/} See, e.g., Wash. Post, Oct. 4, 1979, at D-11, col. 6.

^{20/} See "The Pope In Washington," Wash. Post, Oct. 8, 1979, at A-23, col. 1.

^{21/} See Washington Star, April 2, 1967, at A-1.

^{22/} See Wash. Post, Sept. 1, 1981, at C-1.

aces, and a "brunch" for circus elephants^{23/} at various sites in the memorial core park areas.

Special events of this type, held at various locations in the memorial core area, as well as demonstrations, are coordinated by the Park Service through the use of an advance permit system. 50 C.F.R. § 50.19(b). Persons requesting permission to demonstrate, for example, can secure a permit to demonstrate for up to seven days in one quadrant of Lafayette Park. Id. at § 50.19(e)(5). If there are competing requests for use of the space, the permit will not be renewed. Id. Also, all park users (including demonstrators) must obey a detailed set of Park Service regulations

^{23/} See Permit Application and Park Service Permit for Ringling Bros. and Barpum & Bailey Circus, Ex. 5 to Plaintiffs' Summary Judgment Reply Memo., RD 13.

designed to ensure that no visitors damage park resources or deprive others of their use.^{24/} In these ways, the Park Service has been able to both preserve the memorial core parks and encourage their use for a wide variety and high volume of public activities.

Within the memorial core area, Lafayette Park and parts of the Mall (as well as certain other areas, such as the Ellipse and Farragut Square) have developed as "urban parks," well suited to a healthy mix of political expression and recreational use. Visitors to

^{24/} See, e.g., 36 C.F.R. §§ 50.7-50.18, 50.24-50.35, 50.39-50.45, 50.50-50.52. These regulations prohibit the following activities in the parks, inter alia: damaging statues, drinking fountains, plumbing, lawns, and any other park facilities; dumping, storing any materials, or spilling; picnicking in undesignated areas; gambling; soliciting or sales without a permit; committing a nuisance or engaging in disorderly conduct; unauthorized bathing; use of audio devices; lying on park benches; use of liquor; and obstructing entrances, exits or sidewalks.

Washington, as well as residents of the city and surrounding areas, expect to find a wide variety of both political and recreational activity in these areas.^{25/} Other park areas, near the monuments and memorials, have come to be recognized as places for reflection and contemplation;^{26/} the serenity of such park areas is not at issue in this case.

^{25/} As one guidebook explains, "The park still attracts lunchtime philosophers -- as well as chessplayers and sun-worshippers -- since Lafayette Square is one of the most popular sites for brown-baggers. You may recognize the park as the locale of past demonstrations shown on the nightly news; its proximity to the White House makes Lafayette Square popular with protestors." J. Duffield, W. Kramer, and C. Sheppard, Washington, D.C.: The Complete Guide at 120 (1982). This location has come to be viewed as the American analogue to "Speaker's Corner" in Hyde Park.

^{26/} See 36 C.F.R. § 50.19(c)(2), restricting or prohibiting demonstrations and special events at the Washington Monument, the Lincoln and Jefferson Memorials, and parts of the Kennedy Center; see also Community for Creative Non-Violence v. Watt, 703 F.2d at 599 n.35.

In construing its 1982 "no camping" regulations, the Park Service has twice permitted sleeping activity in demonstration contexts: first, in May, 1982, when it permitted expressive sleeping by 750 to 1,000 Vietnam veterans seeking to re-enact, at a site on the Mall, conditions at United States military encampments in Vietnam,^{27/} and second, in August, 1982, when it renewed the demonstration permit for approximately one dozen Arab women (including the wives of several diplomats) who were sleeping in a tent in Lafayette Park as part of a fast and vigil to protest the Israeli

^{27/} See Vietnam Veterans Against the War "Firebase Razor" Permit Application, and accompanying Park Service Letter and Permit, Exs. 1a, 1b, and 1c to Plaintiffs' Summary Judgment Memo., RD 5.

blockade of Beirut.^{28/}

The 1982 Park Service decisions to allow sleeping by these other demonstrators belie the government's assertion that it has an interest in prohibiting any and all sleeping activity in these park areas. The fact is that plain, ordinary sleeping in the park -- without camping amenities -- impairs no significant governmental interest. Indeed, scores of homeless people sleep in the memorial core park areas each night, in solitary spots, huddled against the elements. They sleep in McPherson Square; they sleep on the grassy lawn south of the Old Executive Office Building. They sleep in the park

^{28/} See Arab Women's Council Permit Application, and accompanying Permit Check List, Exs. 3a and 3e to Plaintiffs' Summary Judgment Memo, RD 5; see also Declarations of Mary Ellen Hombs, ¶¶ 23-26, Carol Fennelly, ¶¶ 3-6, and Barbara Gamarekian (and exhibit thereto), RD 5.

adjacent to the Department of Interior Building, and on the heat grates on nearby corners. And they sleep on the Mall and in Lafayette Park. There are nights when they occupy "virtually every bench" in Lafayette Park.^{29/}

Unfortunately, when homeless people sleep in our parks, isolated and alone, it is all too easy to ignore them. What the homeless persons in this case seek is to assemble in modest numbers and send a message consciously and deliberately, in the hopes that more of us will notice and be moved to respond.

The question in this case, therefore, is not whether the government will allow the overnight presence of homeless people in Lafayette Park or on the Mall; it already does. Rather, the issue is

^{29/} Declarations of Mary Ellen Hombs, ¶ 25, and Carol Fennelly, ¶ 7, RD 5; see also Second Declaration of Clarence West, ¶ 2, RD 5.

whether that presence can have a political dimension, an expressive dimension intended by the homeless people themselves.

SUMMARY OF ARGUMENT

Respondents' proposed activity, sleeping outdoors in a highly visible public place in the dead of winter without amenities to convey the plight of homeless people in America, is expressive conduct meriting presumptive protection under the First Amendment. It constitutes "speech" within the meaning of the First Amendment because respondents intend to convey a particularized message and because the likelihood is great that under the circumstances the message will be understood by those who view it. See Spence v. Washington, 418 U.S. 405, 410-11 (1974); Brown v. Louisiana, 383 U.S. 181 (1966). The form of respondents' expressive activity, its location, and the season in which it occurs, will ensure that the intended

message is understood.

Respondents' expressive activity is crucial to their exercise of First Amendment rights. In this respect, it is similar to the activity of many other Americans who have marched, engaged in sit-ins, and maintained silent vigils in efforts to seek redress of their grievances. Because homeless persons are among the most disadvantaged members of our society, many of them lack the resources and skills necessary to communicate their ideas through classic forms of verbal expression. Yet, like many other disadvantaged Americans, they are able to convey their ideas effectively with a form of symbolic speech. They seek, as one court of appeals judge noted, to express the poignancy of their plight with their bodies.

Expressive activity of this type merits First Amendment protection unless the government can show that it has a substantial or important interest in prohibiting it. In the instant case, petitioners have failed to demonstrate that they have any substantial interest in applying their new "no camping" regulation to ban the expressive activity at issue here. Indeed, as noted below, respondents dispute the applicability of the "no camping" regulation to their conduct here because they do not seek to use park areas for living accommodation purposes.

If, however, the Court determines that the regulation does apply to respondents' proposed activity, then it must also determine whether the regulation's facially valid ban on camping, as applied to the expressive

activity at issue here, is narrowly tailored to any important government interest.

Petitioners have erred in suggesting that the government's ban on the conduct at issue here is justified if it serves merely a reasonable purpose.

Petitioners' Br. at 31-33. Such arguments for a lowered standard of judicial review, as applied to symbolic rather than "pure" speech, are devoid of doctrinal support. Moreover, such arguments, if adopted, are likely to create a category of "second class" First Amendment protection, guaranteeing lesser and fewer rights of expression to those citizens whose resources are more limited and whose expressive skills are less sophisticated.

Respondents submit that the Constitution and the decisions of this

Court require petitioners to demonstrate a substantial government interest as a basis for suppressing the symbolic speech at issue here. Petitioners' have not met and cannot meet this standard. There is no important government interest in prohibiting sleep in the context of a demonstration involving symbolic tents and a twenty-four hour presence by a limited number of demonstrators, particularly when the permits for such activity must be renewed weekly, subject to continuing compliance with a detailed and comprehensive set of controls on conduct in the parks.

Petitioners contend, however, that if demonstrators are allowed to engage in expressive sleeping activity, numerous non-demonstrating park visitors will seek to camp in the memorial core parks. This ad horrendum argument is flawed in

several respects.

First, it misinterprets the proper scope of the "substantial interest" test. That test requires the Court to weigh the government's interest in prohibiting expressive activity by all persons similarly situated to the group asserting First Amendment rights. Heffron v. International Society for Krishna Consciousness, Inc., 452 U.S. 640, 652-53 (1981). In this case, therefore, the relevant government interest to be weighed is the interest, if any, in preventing those persons and groups who seek to sleep outdoors without amenities as part of a demonstration from doing so.

Second, petitioners' ad horrendum argument is wholly speculative. Past demonstrations in the memorial core parks that included sleeping activity did not precipitate an onslaught of people

seeking to sleep in those locations without amenities.

Third, petitioners' ad horrendum argument assumes that the government will be unable to distinguish between those persons who may in good faith seek to engage in sleeping as part of a demonstration and those who may assert an expressive purpose merely as a pretext for sleeping in the park. This argument ignores other instances in which government agencies inquire into the sincerity of groups seeking to exercise First Amendment rights. Such inquiries do not involve content-based discrimination.

In sum, petitioners have not identified any interests substantial enough to justify the Park Service's ban on respondents' protected First Amendment activity.

Finally, as noted above, petitioners contend that the no-camping regulation does not, by its terms, bar their expressive conduct. The regulation prohibits a combination of activities which amounts to use of the parks for living accommodation purposes. 36 C.F.R. §§ 50.19(e)(8) and 50.27(a). Respondents seek only to sleep; they will not break ground, build fires, cook or prepare food, or store personal belongings. Hence, under the "totality of circumstances" test set forth in the Park Service regulation (*id.*), the homeless persons seeking to demonstrate here will not be camping. Respondents submit, therefore, that this Court could fairly construe the Park Service regulation as not prohibiting the activity at issue here, and thereby avoid unnecessary adjudication of a constitutional issue.

ARGUMENT

INTRODUCTORY STATEMENT

Critics of the First Amendment are fond of charging that free speech is the exclusive province of the socially and economically comfortable. Since, they argue, the most disadvantaged segments of any society cannot engage in classic verbal speech because of educational deprivation, poverty or physical or mental incapacity, the First Amendment is a false beacon which legitimates their exclusion from public discourse.

Two significant lines of Supreme Court doctrine stand as dramatic and persuasive refutations of such a critique. First, this Court has recognized that the mode of communication protected by the First Amendment is not narrowly confined to classic verbal expression. Indeed, the first case in

which this Court invalidated a state criminal conviction as violative of the First Amendment involved, not verbal expression, but the display of a red flag. Stromberg v. California, 283 U.S. 359 (1931). As the Solicitor General's brief accurately notes:

This Court has recognized that the purpose of the First Amendment is to protect the people's right to communicate -- to express thoughts and ideas and emotions -- and that, consequently, non-verbal activity ("conduct") that is significantly communicative may deserve First Amendment protection as "symbolic speech."

Petitioners' Br. at 19.30/

30/ See, e.g., Stromberg v. California, 283 U.S. 359 (1931) (display of red flag protected); Gregory v. City of Chicago, 394 U.S. 111 (1969) (civil rights march protected); Tinker v. Des Moines School District, 393 U.S. 503 (1969) (wearing of black armband protected); Brown v. Louisiana, 383 U.S. 131 (1966) (peaceful sit-in protected); Spence v. Washington, 418 U.S. 405 (1974) (per curiam) (peace symbol on flag protected); Schad v. Borough of Mt. Ephraim, 452 U.S. 61 (1981) (dancing protected).

Second, this Court has ruled that free public spaces, such as streets and parks, are proper and natural settings for First Amendment activity. United States v. Grace, 103 S. Ct. 1702 (1983).^{31/} Indeed, the first case in which this Court applied the First Amendment prospectively against local officials involved an attempt to bar economically disadvantaged persons from the use of streets and parks as First Amendment fora. Hague v. CIO, 307 U.S.

^{31/} See also Grayned v. City of Rockford, 408 U.S. 104, 114 (1972) ("The right to use a public place for expressive activity may be restricted only for weighty reasons.").

7

496 (1939).^{32/} Thus, although difficult issues of First Amendment geography will undoubtedly arise,^{33/} the Solicitor General is correct in noting that:

Just because [Lafayette Park and The Mall] have a special place in the national consciousness and because they have such resonance, they ... constitute a fitting and powerful forum for political expression and political protest.

Petitioners' Br. at 11.

^{32/} The classic formulation of the right to engage in expressive activity in our public places is Justice Robert's statement in Hague v. CIO:

Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.

307 U.S. at 515.

^{33/} See, e.g., United States Postal Service v. Council of Greenburgh Civic Associations, 453 U.S. 114 (1981) (postal boxes not open to First Amendment activity).

By combining the protection of non-verbal communicative activity with the protection of the right to engage in expressive activity in public places, this Court has made it possible for every segment of American society, including the most disadvantaged, to participate in the robust and wide-open debate that characterizes a free society.

In the years since World War II, this nation has witnessed an extraordinary outpouring of free expression. What makes that outpouring unique is neither its volume nor its content. Rather, it is the extent to which the poor, the poorly educated and the disadvantaged have been able to enter into the free marketplace of ideas and, by acting as full participants in the democratic process, have been able to influence the course of the nation. No

society has similarly reached out to its economically and politically dispossessed and provided them with the non-violent means of articulating their discontent and their aspiration for change. The relative peacefulness of social change in our society bears witness to the wisdom of this course. Cf. NAACP v. Claiborne Hardware Co., 458 U.S. 886, 911-12 (1982).

While the crosscurrents of our recent history are complex and the causes and effects problematic, one fact emerges with stark clarity: The capacity of a disenfranchised people to rise above a century of oppression and to demand equality was immeasurably enhanced by the decisions of this Court which enabled persons of limited verbal sophistication and even more limited financial resources to "speak" with their bodies in the public spaces of this nation.

Such a mass outpouring of expression is, of course, not without social cost. The widespread use of non-verbal communication in public places poses obvious challenges to a host of legitimate social interests, ranging from noise abatement and traffic control to the preservation and allocation of scarce geographical resources. The attempt to reconcile our commitment to free speech for all, even the disadvantaged, with such legitimate concerns of society has provided this Court with an unending variety of difficult cases.

Respondents believe that both parties herein, as well as the six members of the court below who constituted the majority and the judges who joined in Judge Wilkey's dissent, are in basic agreement as to the applicable legal principles. See Community for

Creative Non-Violence v. Watt, 703 F.2d 586, 592-95 (D.C.Cir. 1983) (Mikva, J.); 601-02 (Edwards, J., concurring); 605 (Ginsburg, J., concurring in the judgment); 611-13 (Wilkey, J., dissenting). Thus, petitioners recognize that symbolic conduct may qualify for presumptive protection under the First Amendment. Petitioners' Br. at 13, 19, 25 n.21. Petitioners also recognize that such conduct is appropriate in public places and that the memorial core park areas of the District of Columbia are particularly apt settings for such political expression. Id. at 11. For their part, respondents acknowledge that such symbolic conduct may be regulated if genuinely necessary to serve important government interests. What divides the parties are the much narrower questions of whether the act of sleeping in the

context of this demonstration is sufficiently expressive to warrant presumptive protection under the First Amendment, and, if so, whether sufficiently weighty governmental interests exist to justify rebutting the presumption.

I. RESPONDENTS' COMMUNICATIVE
ACTIVITY IS CENTRAL TO A
PORTRAYAL OF THE PLIGHT OF THE
HOMELESS AND IS, THUS, IMBUED
WITH SUFFICIENT EXPRESSIVE
CONTENT TO QUALIFY FOR PRESUMP-
TIVE FIRST AMENDMENT PROTECTION

Petitioners recognize that non-verbal modes of expression such as the display of a symbol or the holding of a march or a candlelight vigil are valuable means of communicating thoughts and emotions and are, thus, entitled to a degree of First Amendment protection. Petitioners' Br. at 21-22. Notwithstanding such a welcome recognition, petitioners argue that respondents' attempt to portray the plight of the homeless by sleeping outdoors in a public place in the dead of winter to demonstrate the central facet of their homelessness is not sufficiently communicative to warrant any constitutional protection. Petitioners' Br. at 18. However, precisely because the act of

sleeping outdoors is so central to an accurate portrayal of the reality of homelessness and so critical to the existence of an effective demonstration, it is entitled to presumptive constitutional protection.

A. This Court Has Repeatedly
Recognized the Protected
Nature of Symbolic Expression

This Court has repeatedly recognized that non-verbal expressive activity is a potent form of communication which should receive First Amendment protection. Of course, recognizing that non-verbal expressive activity qualifies for presumptive protection does not mean that the presumption may never be rebutted; it does, however, mean that such expressive activity should not be suppressed unless there is a compelling need to do so and that the burden of establishing that need rests upon the government agency which seeks to ban it.

Thus, in Stromberg v. California, 283 U.S. 359 (1931), the Court invalidated a criminal conviction for displaying a red flag in violation of a California statute. Recognizing that the display of a symbol was clearly "speech" within the meaning of the First Amendment, the Stromberg Court ruled that California had not demonstrated a sufficiently compelling justification for the prohibition to rebut the strong presumption in favor of free expression.

Similarly, in Brown v. Louisiana, 383 U.S. 131 (1966), the Court invalidated criminal trespass convictions of Black demonstrators for engaging in a silent vigil in a racially segregated public library. Recognizing that the silent protest vigil was a potent shortcut from mind to mind, the Brown Court ruled that despite the facial validity of the criminal trespass

statute, Louisiana had not demonstrated a sufficiently compelling justification for applying it to suppress the expressive activity in question.^{34/}

In Edwards v. South Carolina, 372 U.S. 229 (1963), the Court described a civil rights march to the South Carolina State House as "an exercise of ... basic constitutional rights in their most pristine and classic form." Id. at 235. Similarly, in Gregory v. City of Chicago, 394 U.S. 111 (1969), the Court reversed disorderly conduct convictions for engaging in a civil rights march, noting:

^{34/} As in Brown v. Louisiana, 383 U.S. 131, respondents here do not challenge the facial validity of the ban on camping. Rather, as in Brown, it is the attempt to apply it to respondents' communicative activity which raises the constitutional question. See discussion of this point infra on pages 57-63.

Petitioners' march, if peaceful and orderly, falls well within the sphere of conduct protected by the First Amendment.

Id. at 112. In both Edwards and Gregory, the Court first recognized that the communicative conduct before it qualified for presumptive constitutional protection and then required the government to carry the burden of demonstrating a compelling need before applying even a facially valid statute to suppress it.^{35/} See Thornhill v. Alabama, 310 U.S. 88 (1940).

In Tinker v. Des Moines School District, 393 U.S. 503 (1969), the Court set aside a student's suspension from public school for wearing a black armband

^{35/} Where a genuine need for the restriction has been demonstrated, the Court has sustained the facial validity of the statutes in question. Cameron v. Johnson, 390 U.S. 611 (1968) (protecting ingress and egress); Cox v. Louisiana, 379 U.S. 536 (1965) (free passage and prevention of serious public disorder).

to protest the Vietnam War. Recognizing that wearing a black armband was "closely akin to 'pure speech'" (id. at 505), the Tinker Court required the school board to demonstrate a genuine need for the prohibition in order to rebut its presumptively protected status. Since the school board could produce nothing more than the "undifferentiated apprehension" of future harm (id. at 508), the Court overturned the ban on expressive activity.

In Spence v. Washington, 418 U.S. 405 (1974), the Court reversed a conviction for placing a peace symbol on an American flag in violation of the state's flag display statute. The Court held that:

the nature of appellant's activity, combined with the factual context and environment in which it was undertaken, lead to the conclusion that he engaged in a form of protected expression,

id. at 409-10, and required the state to demonstrate a genuine need before suppressing the expressive activity. Since the state was unable to justify the prohibition, the Court deemed the flag display statute "unconstitutional as applied to appellant's activity" (id. at 414), and concluded:

Given the protected character of [the] expression and in light of the fact that no interest the State may have in preserving the physical integrity of a privately-owned flag was significantly impaired on these facts, the conviction must be invalidated.

Id. at 415.

Recently, in Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975), Doran v. Salem Inn, Inc., 422 U.S. 922 (1975), and Schad v. Borough of Mt. Emphraim, 452 U.S. 61 (1981), the Court recognized that entertainment consisting primarily of dancing in various stages of undress qualified for a

degree of First Amendment protection.

In those instances when the Court has upheld bans on expressive activity, it has utilized the same two-part analysis. In United States v. O'Brien, 391 U.S. 367 (1968), the Court found that the government's interest in maintaining an efficient Selective Service registration system justified a prohibition on draft card burning, despite the obvious communicative nature of the act. The government's assertion of need for a ban on the destruction or mutilation of a draft card -- as credited by the Court -- provided precisely the fact-based justification which was lacking in Stromberg, Brown, Edwards, Gregory, Tinker, and Spence. And in Heffron v. International Society for Krishna Consciousness, Inc., 452 U.S. 640 (1981), the state's demonstrated need to regulate

traffic flow on a crowded fairground justified its limitation on peripatetic solicitation.

The teaching of these cases is clear. Once non-verbal activity is deemed to play a significant role in the communication of ideas, it qualifies for presumptive First Amendment protection, which can be rebutted only by a showing that its suppression is genuinely necessary to achieve a significant and legitimate social goal. If the government fails to make such a showing, it may not apply even a facially valid statute in an unconstitutional manner.

B. Respondents' Attempt to Portray the Plight of the Homeless by Sleeping Outdoors in the Dead of Winter in a Highly Public Place Is a Form of Symbolic Expression

In Spence v. Washington, 418 U.S. 405 (1974), this Court articulated common sense criteria for deciding when

non-verbal activity is sufficiently imbued with expressive elements to qualify for presumptive First Amendment protection. In order to qualify for such protection, non-verbal activity must (1) involve "an intent to convey a particularized message;" and (2) present a likelihood that in the surrounding circumstances "the message could be understood by those who viewed it." 418 U.S. at 410-11. Both criteria are satisfied by respondents' attempt to sleep in a highly public place under conditions which typify those which thousands of individual homeless men and women endure each night in less visible locations. As Judge Edwards noted below:

A nocturnal presence at Lafayette Park or on the Mall, while the rest of us are comfortably couched at home, is part of the message to be conveyed. These destitute men and women can

express with their bodies the poignancy of their plight. They can physically demonstrate the neglect from which they suffer with an articulateness even Dickens could not match.

Community for Creative Non-Violence v. Watt, 703 F.2d at 601.

Respondents seek to re-enact in a highly public place a vignette that unfolds in solitude, loneliness, and despair for two to three million Americans every winter's night -- sleeping outdoors without decent shelter. Homeless people are, for most of us, invisible. How else can we explain the fact that over the recent Christmas holidays, fourteen homeless people in New York City and three in Washington, D.C. could be allowed to freeze to death on the street?^{36/} Even when we are confronted

^{36/} See N.Y. Times, Dec. 27, 1983, at A-1, col. 1; Wash. Post, Dec. 27, 1983, at A-1.

with verbal descriptions of their plight, so powerful is the understandable human tendency to ignore the unpleasant, that large numbers of Americans view the homeless as an abstraction, without fully sensing the underlying human tragedy.

Respondents seek to jolt a complacent and comfortable public into a realization of what it means to be a homeless person by demonstrating at the center of the nation's consciousness the fact that human beings are sleeping without decent shelter during the coldest months of the year. Obviously, the act of sleeping under such conditions is the dramatic event that both portrays the larger reality and engages the attention and sympathetic concern of the public. If nude dancing is sufficiently expressive to warrant a degree of First

Amendment protection,^{37/} surely the attempt by the homeless to use one of the few modes of communication available to them -- their bodies -- to draw attention to the fact that they have no place to sleep in the dead of winter is entitled to commensurate protection.^{38/}

Petitioners, recognizing that respondents seek to utilize the act of sleep in the context of this demonstration as a form of expression, raise unpersuasive objections to according it presumptive First Amendment protection. Petitioners argue that sleep, unlike armbands or flags, is not inherently expressive and, thus, cannot constitute a

^{37/} See Schad v. Borough of Mt. Ephraim, 452 U.S. 61 (1981).

^{38/} As the Court recognized in West Virginia State Board of Education v. Barnette, 319 U.S. 624, 632 (1943), "Symbolism is a primitive but effective way of communicating ideas."

form of expression. Petitioners' Br. at 21. However, petitioners' attempt to distinguish between non-verbal activity that they characterize as "inherently expressive" (id. at 21-22) and all other forms of non-verbal communication is unavailing. It overlooks the fact that all non-verbal communication takes its expressive meaning, not from the intrinsic nature of the act, but from the context in which it unfolds. As the Court noted in Spence:

... the context in which a symbol is used for purposes of expression is important, for the context may give meaning to the symbol.

418 U.S. at 410 (emphasis added).

For example, wearing a black armband to class, the symbolic act held protected in Tinker, had no intrinsic meaning. It was only in the context of a day of protest against the Vietnam War that the

armband in Tinker took on a precise meaning which triggered First Amendment protection. 393 U.S. at 504. Similarly, the act of holding a candle or spending a day without eating has no intrinsic significance but may be readily recognized as expressive when conducted in a context that identifies it as a candlelight vigil or a hunger strike. And, in this case, the context surrounding the act of sleeping outdoors makes the plea by the homeless powerful and unmistakable.

Indeed, measured by the thoughtful test suggested by petitioners, respondents' request for permission to re-enact in a highly public place the plight of homeless persons by sleeping outdoors in the dead of winter qualifies for presumptive First Amendment protection. Petitioners recognize that First

Amendment protection should exist for expressive conduct "that can contribute meaningfully to the expressive communication of ideas, opinions and emotions." Petitioners' Br. at 25. Petitioner also recognizes that there may be

some contexts in which an activity can convey a message with sufficient expressive power to be readily understood. A regulation designed to suppress that expression would be subject to First Amendment scrutiny even if, on its face, it affected only common activity not ordinarily classified as speech; First Amendment values are always implicated when the government seeks to suppress or regulate communication.

Petitioners' Br. at 25 n.21.

Respondents have no quarrel with such a formulation. Respondents' disagreement is solely with petitioners' insistence that sleeping outdoors in the context of respondents' planned demonstration is not a powerfully expressive act worthy of First Amendment protection.

Petitioners' ambivalence about whether to recognize the expressive nature of respondents' proposed act flows, respondents suggest, less from a serious doubt as to its communicative value, than from a concern over the variety of activity which might qualify for First Amendment protection.

Petitioners fear that the descriptive test enunciated in Spence is "overinclusive" and will permit persons engaged in violent activity to claim that their lawless acts were intended to communicate a message. Petitioners' Br. at 24 n.18.

However, as the Court in O'Brien clearly recognized, limitations exist on any attempt to claim constitutional protection for non-verbal expressive activity. To qualify as symbolic speech, expressive activity must stand some

chance of surviving the balancing test which is the second half of the First Amendment equation. Political assassination and terror bombings may, in the twisted minds of the fanatics who perpetrate them, be intended as forms of expression. But no one would suggest for a moment that such activity qualifies for any protection. The balance which the First Amendment requires dooms such anti-social activity from the beginning, regardless of any alleged expressive content. In fact, courts have had little difficulty rejecting claims of protection for far less dramatic activity. E.g., United States v. Guerrero, 667 F.2d 862 (10th Cir. 1981) (throwing eggs at political candidate); United States v. Malinowski, 472 F.2d 850 (3rd Cir. 1973) (refusal to pay taxes), cert. denied, 411 U.S. 970 (1973); United States v.

Berrigan, 283 F. Supp. 336 (D. Md. 1968) (destruction of Selective Service files), aff'd sub nom. United States v. Eberhardt, 417 F.2d 1009 (4th Cir. 1969), cert. denied, 397 U.S. 909 (1970). Thus, petitioners' fear that application of the Spence and O'Brien tests will tend to over-protect anti-social activity is unfounded.

In sum, petitioners' argument that respondents' activity is not communicative must be rejected. Both legal principles and factual considerations support the conclusion that the proposed act of sleeping outdoors in a highly public setting in an attempt to dramatize the plight of the homeless is sufficiently expressive to warrant presumptive First Amendment protection. Therefore,

the only remaining issue is whether petitioners have marshalled a sufficiently compelling justification for suppressing the expressive activity under the rubric of a ban on camping.

II. SUPPRESSION OF RESPONDENTS'
COMMUNICATIVE ACTIVITY IS NOT
NECESSARY TO PROTECT AN
IMPORTANT GOVERNMENTAL INTEREST

Respondents do not challenge the facial validity of petitioners' regulation banning camping in the memorial core parks. However, as applied to respondents' symbolic attempt to re-enact the central facet of homelessness by sleeping outdoors in a highly public place in the dead of winter, the ban on camping stifles expressive activity unnecessarily. As with the facially valid criminal trespass statute in Brown v. Louisiana, 383 U.S. 131 (1966), the facially valid disorderly conduct statutes in Edwards v. South Carolina, 372 U.S. 229 (1963), and Gregory v. City of Chicago, 394 U.S. 111 (1969), and the facially valid flag display statute in Spence v. Washington, 418 U.S. 405 (1974), the facially valid

ban on camping at issue in this case may not be applied to stifle expressive activity in the absence of a genuine showing of social need.

Petitioners apparently argue that so long as the general ban on camping is facially valid it may be applied in all settings without raising First Amendment issues. Petitioners' Br. at 31-50. However, such an analysis stands the traditional relationship between "facial" and "as applied" review on its head.

Traditionally, this Court has insisted on determining whether the behavior of the particular litigant before the Court deserves constitutional protection. United States v. Raines, 362 U.S. 17 (1960). Thus, this Court has routinely declined to permit the application of facially valid statutes and regulations to constitutionally protected activity. See, e.g., Brown v.

Louisiana, 383 U.S. 131 (1966); Edwards v. South Carolina, 372 U.S. 229 (1963); Gregory v. City of Chicago, 394 U.S. 111 (1969); and Spence v. Washington, 418 U.S. 405 (1974). Occasionally, this Court has even permitted litigants to raise the rights of third persons in an effort to demonstrate that the statute in question was facially invalid even though the activities of the litigants before the Court might not have been constitutionally protected. See generally Broadrick v. Oklahoma, 413 U.S. 601, 611-16 (1973). Such a relaxation of the traditional rules of standing is, as the Court has noted, "strong medicine" to be used sparingly. Id. at 613.

Not surprisingly, therefore, this Court has never suggested that a litigant's First Amendment rights may be tested not by the litigant's own behavior, but by what third persons might

do in the future. Such an analysis would focus the Court's attention, not on the case or controversy before it, but on hypothetical cases which may never arise. While such an overbreadth analysis may be appropriate to protect vigorous First Amendment activity from improper regulation, it can never be used to suppress activity which, on its own terms, is independently protected by the First Amendment.

Thus, after Broadrick, while a facial challenge to Oklahoma's "little Hatch Act" would be barred, this Court anticipated that "as applied" challenges would continue. 413 U.S. at 614-16 (1973). See also Buckley v. Valeo, 424 U.S. 1, 72-74 (1976); Brown v. Socialist Workers 1974 Campaign Committee (Ohio), 103 S. Ct. 416, 419 (1982); Federal Election Commission v. Hall-Tyner Election Campaign Committee, 678 F.2d 416

(2nd Cir. 1982), cert. denied, 103 S. Ct. 785 (1982). Similarly, while the facial validity of the ban on camping is not at issue here, the Court must assess its validity as applied to respondents' expressive activity.

Petitioners do not even attempt to demonstrate that respondents' proposed activity would itself pose a serious threat to the preservation of the parkland or to the imperative of shared and multiple enjoyment of the parks. Indeed, respondents freely acknowledge an obligation to leave the parkland in at least as well maintained a state as they find it and a willingness to accommodate other persons wishing to use the parkland. Jt.App. at 9-15. Rather, petitioners seek to justify application of the no camping regulation to respondents by launching a classic ad horrendum argument. Petitioners argue

that if respondents are allowed to sleep as part of their demonstration, it will be impossible to prevent widespread use of the core area parks as campgrounds by other persons claiming to be engaged in expressive activity.

Where expressive activity protected by the First Amendment is at stake, however, the mere assertion of an undifferentiated fear of future abuse can never justify suppression. Tinker v. Des Moines School District, 393 U.S. 503 (1969). Moreover, ample safeguards exist that would allow petitioners to preserve the integrity of a general ban on camping, while permitting narrow exceptions for expressive activity undertaken in good faith.

Since it is unnecessary to stifle respondents' expressive activity in order to enforce a general ban on camping, and

since respondents' activity itself poses no threat to any legitimate governmental interest, petitioners' attempt to apply the no camping regulation to ban respondents' expressive activity violates the First Amendment.

A. The Standard of Review in First Amendment Cases Is Designed to Minimize the Improper or Unnecessary Suppression of Expressive Activity

The basic purpose of the First Amendment is to shield expressive activity from improperly motivated or unnecessary suppression by the government. Cohen v. California, 403 U.S. 15 (1971); Brandenburg v. Ohio, 395 U.S. 444 (1969); Street v. New York, 394 U.S. 576 (1969). Not surprisingly, therefore, this Court has adopted a standard of review in First Amendment cases which requires the government to do more than establish mere rationality in

order to rebut the presumption in favor of free speech.

In cases involving classic modes of verbal expression, such as speech-making and publishing, the method of expression almost never impinges upon a legitimate governmental interest. In such cases, attempts at suppression are almost always framed in terms of preventing certain adverse consequences which are alleged to flow from the content of the speech in question. See, e.g., Brandenburg v. Ohio, 395 U.S. 444 (1969); Street v. New York, 394 U.S. 576 (1969). Prior to the Holmes-Brandeis formulation of the modern role of the First Amendment,^{39/} this

^{39/} See generally, Schenck v. United States, 249 U.S. 47 (1919); Abrams v. United States, 250 U.S. 616, 627 (1919) (Holmes, J., dissenting); Whitney v. California, 274 U.S. 357, 372 (1927) (Brandeis, J., concurring).

Court utilized a variation of "rational basis" review to uphold restrictions on certain speech based on its "bad tendency" to lead to anti-social behavior. See, e.g., Gitlow v. New York, 268 U.S. 652 (1925). Under the "bad tendency" test, a speech ban was valid as long as the government had a rational basis for believing that the speech might lead to something worse. Id. at 667. The "clear and present danger" test formulated by Justices Holmes and Brandeis was, of course, nothing less than the rejection of the "bad tendency-rational relationship" standard in favor of a more stringent standard of review, which required a showing, not merely of rationality, but of compelling necessity, before speech could be silenced.

Similarly, as Americans experimented with more novel forms of expression such

as leafletting and picketing, this Court rejected a rational basis standard of review as insufficiently protective of robust communication in favor of a standard which required a showing that the restriction was, in fact, necessary to achieve an important governmental end. Thus, a rational relationship between leafletting and the prevention of litter, while clearly a legitimate concern, was too weak a basis on which to suppress speech. See, e.g., Schneider v. State, 308 U.S. 147 (1939); Niemotko v. Maryland, 340 U.S. 268, 273 (1951) (Frankfurter, J., concurring). See also Lovell v. Griffin, 303 U.S. 444 (1938).

Similarly, although there is a rational relationship between picketing and impeding free public passage, that interest was deemed insufficient to warrant a general ban on picketing. See,

e.g., Thornhill v. Alabama, 310 U.S. 88 (1940); Cox v. Louisiana, 379 U.S. 536 (1965).

Modern First Amendment cases have continued to recognize that heightened scrutiny is necessary to ensure adequate protection of First Amendment values. Thus, in two of its most recent First Amendment decisions the Court made careful use of the strict standard of review, which requires the government to demonstrate a compelling need -- not merely some lesser basis -- for suppressing expressive activity. In United States v. Grace, 103 S. Ct. 1702 (1983), this Court invalidated a ban on First Amendment activity on the sidewalk abutting the Supreme Court. As the Court recognized, it was a proper purpose for Congress to desire that the sidewalk immediately abutting the Court reflect the tranquility which is the hallmark of

reasoned adjudication. The Court noted that purpose was rationally served by a ban on all demonstration activity on the sidewalk. Id. at 1709. However, despite the rationality of the Congressional purpose, the Court in Grace found that the government had not demonstrated a compelling need to ban the expressive activity at issue.

Similarly, in Heffron v. International Society for Krishna Consciousness, Inc., 452 U.S. 640 (1981), this Court considered whether a requirement that solicitation of funds at the Minnesota State Fair take place at fixed booths was necessary to advance a sufficiently important state interest. The Court recognized that crowd control was a significant concern, but that recognition did not end its inquiry. It was only because the state had

demonstrated the actual necessity for its fixed booth requirement in the densely populated fairgrounds that this Court upheld the regulation as necessary to advance it. Id. at 651-55. Thus, unlike the activity at issue in Grace and the activity at issue in this case, the solicitation in Heffron actually created a threat to an important governmental interest.

The application of such a standard in First Amendment cases is far more than a legal technicality. As with the related concept of burden of proof, the standard of review determines the ease with which the government may overcome the presumption of freedom to engage in expressive activity established by the First Amendment. See generally Santosky v. Kramer, 455 U.S. 745 (1982); Addington v. Texas, 441 U.S. 418 (1979); In re

Winship, 397 U.S. 358 (1970). A standard of review premised on mere rationality would permit the presumption to be overcome in virtually every case -- witness the unhappy history of the First Amendment under the "bad tendency" test and the fate of most challenges to government regulation of economic activity. See, e.g., Williamson v. Lee Optical of Oklahoma, 348 U.S. 483 (1955). See also Railway Express Agency, Inc. v. New York, 336 U.S. 106 (1949); Goesaert v. Cleary, 335 U.S. 464 (1948); Kotch v. Board of River Pilots Comm'rs, 330 U.S. 552 (1947).

On the other hand, the heightened standard adopted by the Court requires that the government marshal very significant justifications for any attempt to suppress expression. The application of the heightened standard,

therefore, provides the breathing space which permits robust expression to flourish. It assures that, despite the stress of a complex world, we continue to be faithful to the preeminent role free expression plays in our system.

Petitioners' brief accurately notes the heightened judicial protection generally afforded expression.

Petitioners' Br. at 27, 31. Petitioners argue, however, that where non-verbal expressive activity is at stake, a lesser degree of protection is appropriate. Thus, petitioners suggest a sliding scale of protection, ranging from heightened protection for classic verbal speech and "inherently communicative" symbols like flags and armbands to a lesser standard for expressive activity similar to respondents'. Petitioners' Br. at 25-27, 29-34. However, such a sliding scale would doom unorthodox forms of expression

to widespread suppression and would dramatically reduce the ability of the disenfranchised to join in the national debate.^{40/} No basis exists to suggest that verbal expression should enjoy a high degree of protection but that

^{40/} Given the importance of First Amendment activity, as recognized in the Constitution and by the Court, it is unfortunate that petitioners have chosen to argue that a lower standard of review should apply here. See Petitioners' Br. at 25-27, 29-34. Petitioners took the position in the district court and the court of appeals that they should demonstrate, and could demonstrate, that their decision to prohibit expressive sleeping activity was necessary to serve substantial government interests. See Memorandum of Points and Authorities in Support of Defendants' Motion for Summary Judgment and in Opposition to Plaintiffs' Motion for Summary Judgment at 9-12, RD 12; Appellees' Response in Opposition to Appellants' Emergency Motion for Injunction Pending Appeal at 18-19, 28-30. Doubts about whether petitioners made or failed to make the requisite showing in the instant case should not prompt them to urge, or the Court to adopt, modifications in the key constitutional standard.

symbolic expression, often the only means of expression available to the most seriously disadvantaged, should be subject to widespread suppression under a lesser test. Indeed, the adoption of differential standards of review keyed to the form of expression would itself raise serious constitutional questions. Cf. Minneapolis Star and Tribune Co. v. Minnesota Comm'r. of Revenue, 103 S. Ct. 1365 (1983).

Rather, this Court should continue to afford heightened protection to all expression, recognizing that while the form of expression ought not to affect the standard of review, it obviously affects the degree of justification available to the government in seeking to defend the prohibition at issue. The question raised by this case, therefore,

is whether the government has demonstrated that the suppression of the expressive activity at issue here is necessary to advance a significant governmental interest. If the government has not made such a showing, no reason exists to tolerate the snuffing out of an expressive voice -- even an unorthodox one.

B. Permitting Respondents' Demonstration Activity Will Not Compromise Petitioners' Ability to Enforce an Effective Ban on Camping in the Memorial Core Parks

Petitioners rest much of their case on the argument that if respondents are permitted to sleep as part of their demonstration, the general public will become entitled to camp overnight in Lafayette Park and on the Mall, thereby destroying the ban on camping in the parks. This ad horrendum argument suffers from three basic flaws.

First, petitioners misinterpret the proper scope of the inquiry into the relevant government interest. Two polar approaches exist to the problem. Both are wrong. In Heffron v. International Society for Krishna Consciousness, Inc., 452 U.S. 640 (1981), a religious group unsuccessfully argued that in weighing the relevant governmental interest advanced by a regulation on First Amendment activity, only the activities of the particular speakers before the court could be considered. This Court rejected such an attempt to narrow the scope of inquiry, holding that the government interest must be weighed in light of "similarly situated" groups likely to engage in the same First Amendment activity. Id. at 652-53.

In the instant case, petitioners assert the polar opposite of the position taken by the religious group in Heffron.

They argue that in weighing the governmental interest in suppressing expressive activity the Court must make the assumption that every member of the general public would engage in the same activity. Petitioners' Br. at 45, 47.

However, the government's attempt to unduly broaden the scope of inquiry in this way is no more acceptable than was the religious group's attempt to unduly narrow it in Heffron. Both polar approaches ignore the Court's common sense recognition that the appropriate scope of inquiry is the group of similarly situated persons likely to engage in the First Amendment activity at issue. Heffron, 452 U.S. at 652-53. In the context of this case, few, if any, members of the general public are "similarly situated" to respondents

within the meaning of Heffron.^{41/}

The second flaw in the government's ad horrendum argument is that it is based on the wholly speculative, entirely unsubstantiated assumption that many persons will seek permission to sleep overnight in Lafayette Park or on the Mall. As noted above, this is the type of undifferentiated fear or apprehension that this Court has rejected when proffered as the basis for a limitation on expressive conduct. See Tinker v. Des Moines School District, 393 U.S. 503, 508 (1969). There is no historical or empirical basis for this fear. Indeed,

^{41/} Petitioners' suggestion that a search for similarly situated persons is "artificial" or "circular" (Petitioners' Br. at 46 n.39), appears to assume that no criteria exist to differentiate respondents from the general public. The obvious distinction between persons seeking in good faith to express an idea by sleeping outdoors without amenities and some putative campers is discussed infra at pages 79-82.

there have been a limited number of occasions when the government has permitted or countenanced sleeping activity in Lafayette Park or on the Mall. Most recently, the Park Service permitted approximately 750 to 1,000 Vietnam veterans to sleep on the Mall for three days in May 1982 in a reenactment of conditions they endured during the Vietnam conflict, and renewed the demonstration permit for approximately twelve Arab women (including the wives of several diplomats) who were sleeping in Lafayette Park as part of a ten-day vigil and hunger fast in the summer of 1982.^{42/} Neither of these two demonstrations, nor other earlier occasions (in the 1930s and 1960s) involving sleeping in the core

^{42/} See Statement of the Case, supra at pages 17-18, and portions of the record cited therein.

memorial park areas, resulted in an onslaught of requests to sleep or stay overnight in these parks.^{43/}

The third flaw in petitioners' ad horrendum argument is that it assumes the impossibility of distinguishing between respondents' obviously good faith attempt to dramatize a tragic reality and a bad faith attempt to use the parks as a campground by persons pretending to

^{43/} Even assuming arguendo that more persons will seek to engage in expressive sleeping activity in demonstration contexts if respondents' activity is allowed, the government has not shown that this will tax its resources or in any way deprive other users of park space. A wide variety of regulatory restrictions, already contained in 36 C.F.R. Part 50 (and described in footnote 24, supra), will serve to ensure that this expressive sleeping does not expand to include activities that might tax park resources. Moreover, in the highly unlikely event that there is a "great increase" (Petitioners' Br. at 39) in the number of demonstrators who seek to engage in such activity, there are a wide variety of options available to the Park Service for avoiding, or meeting and resolving, any problems which may arise. See Community for Creative Non-Violence v. Watt, 703 F.2d at 598-99, and nn.33-35.

demonstrate. Petitioners' Br. at 36-38. Such an assumption ignores the fact that several government agencies already make valid inquiries into the sincerity of individuals' or groups' claims for the exercise of First Amendment rights.

One example of such an inquiry is the system of conscientious objection to the military draft, which turns in large part on findings of sincerity and good faith. Under this system, the Selective Service Commission must determine whether a draft registrant's opposition to war on religious grounds is sufficiently sincere to warrant exemption from military service. See 50 U.S.C. App. § 456(j). Such a determination often requires more than a simple inquiry into whether the registrant belongs to an organized church or believes in a God or Supreme Being. See United States v. Seeger, 380 U.S. 163 (1965); Welsh v. United States, 398 U.S.

333 (1970). It may require the agency to probe the sincerity of the registrant's asserted moral or ethical abhorrence of war. Welsh, 398 U.S. at 343-44.

Similarly, in determining whether the imposition of certain government obligations (such as compulsory school attendance) or the withdrawal of certain government benefits (such as unemployment compensation) interfere with the free exercise of religion, the appropriate government agency must first assess the sincerity of the religious belief asserted by the individual involved. See Wisconsin v. Yoder, 406 U.S. 205, 214 (1972); Sherbert v. Verner, 374 U.S. 398, 399 n.2 (1963).^{44/}

^{44/} Under the Noerr-Pennington doctrine, those charged with the enforcement of federal anti-trust laws have a similar responsibility for weighing the bona fides of business entities' assertions that certain of their activities should be protected by the First Amendment, and for ascertaining that those assertions are not a mere sham to cover attempts to interfere with the
(footnote continued)

In sum, inquiries into bona fides are not uncommon in the administration of programs which implicate First Amendment rights. In the context of this case, such an inquiry would not require the Park Service to distinguish between speakers on the basis of the content of their messages, as petitioners suggest. Petitioners' Br. at 36-37. Rather, it would merely require the Park Service to assess whether a request by demonstrators to sleep in order to convey a message is made in good faith.^{45/}

^{44/} (continued)

business relationships of a competitor. See Eastern Railroad Presidents Conference v. Noerr Motor Freight, 365 U.S. 127 (1961); United Mine Workers v. Pennington, 381 U.S. 657 (1965).

^{45/} Such an assessment of sincerity would, of course, require the Park Service to inform itself as to the content of the message to be conveyed and the demonstrator's asserted reasons for seeking to convey that message by sleeping. These types of assessments, which both courts and government agencies are called upon to make fairly and objectively, do not constitute content-based discrimination.

C. Permitting Respondents'
Communicative Activity Will
Not Impair Any Governmental
Interests

Petitioners have agreed that respondents may conduct a demonstration on the Mall and in Lafayette Park consisting of (1) the erection of tents; (2) a round-the-clock presence of persons in and about the tents; and (3) the assumption of feigned postures of sleep by such persons. Respondents have agreed that the demonstrators may not (1) prepare or serve food; (2) build fires; (3) break the earth; or (4) store personal belongings. The sole point of disagreement between the parties is whether the demonstrators, while feigning sleep, may actually fall asleep. Petitioners have never suggested any reason -- rational or otherwise -- why such a distinction should be maintained. Once petitioners recognized that no basis

existed for banning respondents' round-the-clock demonstration involving feigned sleep, no rational basis existed for refusing to permit actual sleep during the demonstration.^{46/}

^{46/} Petitioners have asserted two rationales for prohibiting sleep in a demonstration context. First, they attempt to argue that permitting sleep during an ongoing demonstration would deprive other users of park space, or tax park resources, sanitation facilities, or law enforcement personnel. Petitioners' Br. at 35-36. However, once the government has issued a permit for a certain number of demonstrators to use a designated quadrant of Lafayette Park, as provided under the current regulations for up to one week (36 C.F.R. § 50.19(e)(5)), or a designated subportion of the Mall, the amount of space occupied by those demonstrators, and the impact on park resources, does not depend on whether or not they sleep. During the one-week period covered by their demonstration permit, other park users can occupy and enjoy the other three quadrants of Lafayette Park and the entire remaining Mall area. At the close of the one-week period, if there are competing demands for the same space in use by the demonstrators, then their permit will not be renewed. Id.

Second, petitioners claim that the prohibition on sleeping in a demonstration context is justified because it will serve to limit the number of persons who seek to maintain a twenty-four hour vigil. Petitioners' Br. at 39, 43 n.36.

(footnote continued)

Petitioners claim that this argument is "perverse" because the Park Service only permits round-the-clock demonstrations and the erection of symbolic structures under the compulsion of earlier court of appeals decisions. Petitioners' Br. at 44. Petitioners' complaint is groundless. What petitioners overlook is the fact that the case on which they chiefly rely was a First Amendment - Equal Protection case:

46/ (continued)

However, the government is guessing when it asserts that allowing expressive sleeping activity will "greatly increase" (*id.* at 39) the number of demonstrators who maintain around-the-clock vigils. The government itself acknowledges that "not many people are up to the austerities of all-night vigils." *Id.* at 43 n.36. Yet it assumes, inexplicably, that many people will be "up to," indeed, will be eager for, the austerities of a vigil combined with expressive sleeping activity in an open, public space, with no food service, heating or cooling system, showers or other amenities. There is no evidence in the record or elsewhere to suggest that this is the case. Cf. Tinker v. Des Moines School District, 393 U.S. 503 (1969).

It only ordered the Park Service to extend to all demonstrators the ~ privileges that had theretofore been extended to entities and groups with favored messages, such as the Christmas Pageant for Peace. See Women Strike for Peace v. Morton, 472 F.2d 1273 (D.C. Cir. 1972). If the Park Service wishes to amend its regulations to restrict the use of symbolic structures, Women Strike for Peace does not prohibit it from doing so, as long as it extends those restrictions equally to everyone's activities.^{47/} But as long as favored entities and groups are permitted to use structures, it is the Constitution, not the court of appeals, that requires such "permission

^{47/} Such restrictions, if proposed, would have to meet First Amendment criteria. The serious constitutional issues that might be posed by such an amendment to the regulations are not before the Court at this time.

[to] be granted with an even hand."

Women Strike for Peace, 472 F.2d at 1304
(Robb, J., concurring).^{48/}

Petitioners also argue that the majority below unfairly "disaggregated" the government's prohibition into its constituent parts in order to determine

^{48/} Petitioners' other citations on this point are simply misleading. United States v. Abney, 534 F.2d 984 (D.C.Cir. 1976), struck down a regulation because of the unfettered discretion it placed in the hands of administrative officials. And Park Service regulations already permitted 24-hour demonstrations prior to A Quaker Action Group v. Morton, 516 F.2d 717 (D.C.Cir. 1975). See id. at 734.

Petitioners also advert to this Court's action in Morton v. A Quaker Action Group, 402 U.S. 926 (1971). Petitioners' Br. at 19 n.14. This Court's order in Morton summarily vacated, without explanation, an equally summary action by the court of appeals. The entire proceedings in this Court, from the initial filing of the Solicitor General's application for a stay to the issuance of this Court's order, spanned less than 24 hours. The unexplicated summary vacation of a summary modification of a preliminary injunction is not a decision on the merits and does not carry precedential weight in this Court. See Edelman v. Jordan, 415 U.S. 651, 670-71 (1974); Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 499 (1981).

whether a particular prohibition was valid. Petitioners' Br. at 42. Such a "distorted analysis," petitioners charge, enabled the court "to invalidate the regulation by a technique of 'divide and conquer.'" Id. However, what the petitioners call "disaggregation" is merely a requirement that the government justify a ban on expressive activity by demonstrating that the proposed speech would, in fact, interfere with an important governmental interest.

In effect, petitioners argue that the sum of the government's ban is greater than its constituent parts and that it is unfair to require a justification for each element in the regulation. However, as even the dissenting judges below recognized, when the enforcement of a particular element is the pretext for banning expressive activity, the government's duty is not to

attempt to submerge the element in a mystical whole that resists analysis, but to explain why the particular element is genuinely necessary to advance an important government interest. See Community for Creative Non-Violence v. Watt, 703 F.2d at 615 n.43 (Wilkey, J., dissenting).

In short, petitioners have asserted a right to ban expressive conduct because they cannot be bothered with implementing a narrower prohibition which could permit expression while forbidding abusive activity. If the government can ban speech merely because of a risk that people may act abusively in the future and then justify the ban by claiming that it is too much trouble to take reasonable steps to minimize that risk, the First Amendment will have suffered a serious blow. See Terminiello v. Chicago, 337 U.S. 1, 4 (1949).

III. RESPONDENTS' PROPOSED ACTIVITY
IS NOT CAMPING WITHIN THE
MEANING OF 36 C.F.R. PART 50

The parties and courts below have focused on the constitutionality of applying the Park Service's ban on camping to respondents' symbolic activity. However, as respondents pointed out in the court of appeals, it is possible to resolve this case without confronting the First Amendment issue.^{49/}

As petitioners' brief carefully and correctly points out, the ban on camping is designed to prevent the use of parkland as "living quarters."

Petitioners' Br. at 38. It is not intended to ban sleeping per se, but only sleeping as incidental to the use of the park as a living accommodation. That is, apparently, why the no camping regulation

^{49/} See Appellants' Reply to Appellees' Opposition to Emergency Motion for Injunction Pending Appeal and Opposition to Appellees' Motion for Summary Affirmance at 71-73.

was not invoked against Vietnam veterans who erected a symbolic firebase on the Mall.^{50/} It is difficult to see how respondents' attempt to sleep outdoors in the dead of winter without food or personal belongings in an attempt to dramatize the plight of the homeless can be characterized as establishing a living accommodation. Community for Creative Non-Violence v. Watt, 670 F.2d 1213, 1216-17 (D.C. Cir. 1982).

^{50/} Community for Creative Non-Violence v. Watt, 703 F.2d at 589. Respondents continue to assert, as they did below (with considerable factual support), that the petitioners have unequally applied their new "no camping" regulation to allow sleeping activity by some demonstrating groups while prohibiting it by others. This equal protection claim, upon which the facts were sharply disputed, remains open. The district court improperly granted summary judgment on it, based on findings on disputed factual issues. The court of appeals found it unnecessary to reach the equal protection question. Therefore, if the case is not decided in respondents' favor on First Amendment grounds, or by an interpretation of the regulation in their favor, it should be remanded for further proceedings on their equal protection claim.

Indeed, the distinctions between a catnap at noon, a symbolic attempt to sleep in the park in an attempt to make a dramatic point, and an attempt to set up housekeeping in the park are implicit in the regulation itself. Where, as here, demonstrators do not seek to store personal belongings, to eat or to make fires, but merely seek to dramatize the plight of the homeless by publicly re-enacting their central dilemma, the activity cannot fairly be characterized as establishing a living accommodation. Thus, it does not fall within the no camping ban. Given the serious constitutional issues posed by a contrary interpretation of the regulation, it would be consistent with long-established doctrine to construe the no-camping regulation as permitting the respondents' symbolic activity. See United States v.

Clark, 445 U.S. 23, 26 (1980); United States v. Thirty-Seven Photographs, 402 U.S. 363, 369 (1971); Rosenberg v. Fleuti, 374 U.S. 449, 451 (1963).

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed, or in the alternative, the case remanded for further proceedings on respondents' claim that the ban on

sleeping has been unequally enforced.

Respectfully submitted,

BURT NEUBORNE
CHARLES S. SIMS
American Civil Liberties
Union Foundation, Inc.
132 West 43rd Street
New York, New York 10036

LAURA MACKLIN*
Institute for Public
Representation
600 New Jersey Avenue, N.W.
Washington, D.C. 20001
(202) 624-8390

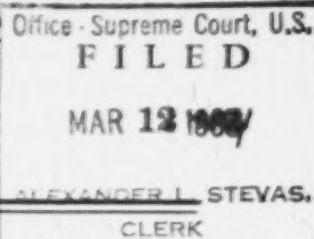
ARTHUR B. SPITZER
ELIZABETH SYMONDS
American Civil Liberties
Union Fund of the
National Capital Area
600 Pennsylvania Ave., S.E.
Washington, D.C. 20003

Of Counsel:
ARLENE S. KANTER

February 1, 1984

*/ Counsel of Record for Respondents
Stephen E. Meili, a 1983 graduate of New York University School of Law and a graduate fellow at the Institute for Public Representation, assisted in researching and drafting this brief.

No. 82-1998



In the Supreme Court of the United States

OCTOBER TERM, 1983

WILLIAM P. CLARK, SECRETARY OF THE INTERIOR,
ET AL., PETITIONERS

v.

COMMUNITY FOR CREATIVE NON-VIOLENCE, ET AL.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

REX E. LEE
Solicitor General

PAUL M. BATOR
Deputy Solicitor General

ALAN I. HOROWITZ
Assistant to the Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

TABLE OF AUTHORITIES

	Page
Cases:	
<i>Brown v. Louisiana</i> , 383 U.S. 131	8, 9
<i>Edwards v. South Carolina</i> , 372 U.S. 229	8, 9
<i>Heffron v. International Society for Krishna Consciousness, Inc.</i> , 452 U.S. 640	6, 8
<i>Sherbert v. Verner</i> , 374 U.S. 398	10
<i>United States v. Grace</i> , No. 81-1863 (Apr. 20, 1983)	6
<i>United States v. O'Brien</i> , 391 U.S. 367	5
Constitution:	
U.S. Const. Amend. I	<i>passim</i>

In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 82-1998

WILLIAM P. CLARK, SECRETARY OF THE INTERIOR,
ET AL., PETITIONERS

v.

COMMUNITY FOR CREATIVE NON-VIOLENCE, ET AL.

*ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT*

REPLY BRIEF FOR THE PETITIONERS

I.

We are in agreement with the more sober statements in respondents' brief (Br. i, 21, 37)¹ about what is at issue in this case: do respondents have a constitutional right to use Lafayette Park and the Mall as places in which to sleep overnight in tents, where the stated purpose of this activity is to demonstrate the plight of the homeless?² But at

¹"Br." refers to respondents' brief in this Court.

²Respondents sought permission from the National Park Service to erect 60 tents in Lafayette Park and the Mall, in order to allow 150 persons to sleep overnight in tents for a period of three months. Respondents say (Br. 2) that they "do not seek to use the park or the Mall for 'sleeping accommodations,' 'living accommodations,' or 'camping purposes'." Instead, they say, their proposed activity is "sleeping outdoors [that is, in tents] in a highly visible public place [that is, in Lafayette Park and the Mall] * * * to convey the plight of homeless

numerous other points in their brief respondents engage in overblown and misleading characterizations of what is at stake. Respondents say their proposed sleep-in should be constitutionally protected because they are citizens "whose resources are more limited and whose expressive skills are less sophisticated" (Br. 24); consequently they "lack the resources and skills necessary to communicate their ideas through classic forms of verbal expression" (Br. 22). Being "disadvantaged," they cannot engage in "classic verbal speech" (Br. 28). They must therefore "express the poignancy of their plight with their bodies" (Br. 22). This thus becomes a case where "unorthodox forms of expression" (Br. 71) must be protected in order to allow "the disenfranchised to join in the national debate" (Br. 72), as against

people in America" (Br. 21; see also *id.* at i, 37). We are happy to accept this description. But then one scours the dictionary in vain to discover why this does not constitute using the parks for "sleeping accommodations," "living accommodations," or "camping purposes." Indeed, the very purpose of respondents' proposed demonstration is to *live* in the parks to demonstrate that respondents have no other place to live.

The words we elided are: "in the dead of winter without amenities" (Br. 21). It is true that respondents' demonstration was planned for the winter months, but the constitutional relevance of this constantly repeated (see, e.g., Br. i, 2, 21, 37, 49, 51, 57) seasonal thrust is obscure. Respondents cannot seriously be suggesting that the constitutional right to engage in expressive sleep in the parks can be limited to the "dead of winter." (Respondents themselves have indicated that they are prepared to conduct their demonstration in the spring rather than the winter. See Declaration of Harold Moss, Mar. 20, 1983 (filed in this Court as a supplement to respondents' opposition to petitioners' application for a stay).)

"Without amenities," we suppose, refers to the fact that respondents did not propose to install toilets, showers, or cooking facilities. This seems to us to leave the case exactly where both we and respondents started: respondents sought to use the parks for a prolonged stay during which they would spend the nights sleeping in tents. Most people would call this using the park for "sleeping accommodations," "living accommodations" or "camping purposes."

"[c]ritics of the First Amendment [who] are fond of charging that free speech is the exclusive province of the socially and economically comfortable" (Br. 28).

The unwary reader would conclude from all this that a severe and censorious government was busying itself here engaging in "widespread suppression" (Br. 72) of symbolic expression so as to make sure that "persons of limited verbal sophistication" will not be allowed to "speak" with their bodies in the public spaces of this nation" (Br. 33). But what happened in fact? Did the government force these demonstrators to make their point by using "classic verbal speech"? No. Respondents were allowed to conduct their demonstration exactly where they wished to—Lafayette Park and the Mall, revered areas at the heart of the city and the nation. They were allowed, as they wished, to remain around the clock. Symbols—signs, pictures, mime-shows, even "symbolic" tents—were all permitted. Respondents were quite free to express their plight with their bodies as well as with words: they could stay overnight, march or sit or lie down, stand in silent vigil, sing or chant. In addition, respondents—whose affidavits show that they are far from inarticulate—were also free to engage in all forms of "classic verbal expression."³ The fact is that respondents' proposed demonstration was treated with a generosity that would be quite unheard of in most other societies. Respondents were allowed to do *everything* they wished to do except for one thing: to go into their tents and spend the nights asleep. This, they were told, is forbidden. And it is forbidden, not because the government seeks to suppress unorthodox forms of expression or reserve the First Amendment for the

³The suggestion that "verbal expression" is First Amendment activity reserved for the use of the "socially and economically comfortable" would surely be greeted with considerable surprise by those—from Thomas Paine to Martin Luther King—whose lives and words have constituted the history of American civil rights and civil liberties.

comfortable classes, but because it would convert respondents' demonstration into an activity that has always and sensibly been considered unsuited to these parks: using them as "sleeping accommodations," "living accommodations," or for "camping purposes."

II.

Respondents say that the "act of sleeping outdoors" is "central" to an "accurate portrayal of the reality of homelessness" and is therefore "critical to the existence of an effective demonstration" (Br. 37-38). Why? We cannot accede to the factual premises underlying this *ipse dixit*.⁴ Nor do we agree with the First Amendment theory on which it is based. Respondents seem to believe that whenever a person asserts that "acting out" an idea is the best way to communicate an idea, the "acting out" itself automatically becomes "speech," fully protected by the First Amendment unless regulation is justified by a compelling governmental interest. On this analysis, there is no distinction at all between "speech" and "conduct"; "expressive" eat-ins are "speech" if intended to protest hunger; "expressive" destruction of property becomes "speech" designed to communicate rage or contempt. Distinctions come into play only when one turns to the question whether there is a government interest justifying regulation. (The point is vividly dramatized on pages 53-54 of respondents' brief, where they appear to suggest that political assassinations and terror bombings are excluded from First Amendment protection *not* because they do not constitute "symbolic speech," but only because they stand no chance of

⁴As is fully developed in our opening brief (at 20-26), our submission is that the actual act of sleeping is marginal to the expressive power of respondents' demonstration. Respondents were given enormous space for First Amendment activities; it defies belief to assert that their *communicative* activities were meaningfully hampered by the requirement that they sleep elsewhere.

"surviving the balancing test which is the second half of the First Amendment equation" (Br. 54).) But, as we fully explain in our opening brief (at 18-24), this Court's symbolic speech cases simply do not support such a radical revision of the text of the First Amendment, one that wholly dissolves the notion of "speech." And respondents persistently ignore the Court's explicit warning in *United States v. O'Brien*, 391 U.S. 367, 376 (1968), rejecting the notion that "an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea."

III.

Having eaten their cake, respondents purport to have it, too. Having dissolved all distinctions for purposes of determining when "conduct" constitutes "speech," they also flatten out all distinctions when one turns to the question of how to evaluate whether the government's interests are sufficient to justify regulation. It's all one: whether the government says you may not give a political talk in the park, or says you may not sleep in tents in the park, the identical requirement — a showing of a "compelling" governmental need (Br. 67) — immediately comes into operation (see Br. 36, 56, 73). In fact, the most striking aspect of respondents' brief in this Court is that its analysis of what justification must be shown for the regulation barring camping in the park (see Br. 67-74) could be used *in haec verba* for a case where the government simply prevented a person from demonstrating at all — the issue is reduced to the stark question whether "the government can ban speech" (Br. 89) in order to protect the parks.

Again, we believe that our opening brief (at 29-30) fully explains why such a flattened approach is inappropriate. It simply makes no sense to treat this case as if respondents had been actually prevented from speaking. It makes no sense to pretend that their entire demonstration has simply

been prohibited. It is not the law that all forms of conduct, no matter how marginally expressive, have identical weights in the First Amendment balance. It is conventional First Amendment analysis — not a “modification” of a “key constitutional standard” (Br. 72 n.40) — to take into account, in the balancing process, the actual impact of a government regulation on expression, on the ability to communicate.⁵

It is worth reiterating, in this connection, that the government is not seeking here to suppress or regulate expression at all. Whatever restriction on expression exists in this case is a marginal and incidental effect of a neutral regulation⁶ justified by purposes that have nothing to do

⁵There is no absolute First Amendment right to deliver a message in the precise manner claimed by a demonstrator to be most effective; a regulation that completely bars a demonstration is subject to more severe scrutiny than one that merely regulates its manner. See *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 647 (1981). “Time, place and manner” regulations are tested in part in terms of whether “alternative channels” of communication are left open. See, e.g., *United States v. Grace*, No. 81-1863 (Apr. 20, 1983), slip op. 5. Thus, this test explicitly contemplates that a government interest that might not justify a prohibition on speech might justify regulation of its “manner.” Preserving the beauty and serenity of the Memorial-core parks is a substantial government interest — one that, we think, fully justifies the minimal restriction on expression that is entailed by the rule that you may not spend the night asleep in these parks. It is a different question whether that same interest would justify a rule barring all demonstrations in these areas. To treat the two questions as identical is not good sense, nor good law.

⁶Respondents assert (Br. 17-18) that the Park Service has in other cases permitted expressive sleeping. This factual assertion was emphatically rejected by the district court (Pet. App. 97a-98a, 106a-108a; see also *id.* at 55a nn. 19 & 20 (opinion of Wilkey, J.)). Just as in this case, the Arab Women’s Council demonstration permit was approved on the condition that the participants engage in a “wakeful vigil” and that they comply with the “no camping” regulations. See Exh. 3b to Plaintiffs’ Summary Judgment memorandum. The Vietnam Veterans Against the War (VVAW) demonstration occurred before the existing regulations

with expression. Thus, respondents' assertion (Br. 56) that the government is "suppressing * * * expressive activity under the rubric of a ban on camping" is wholly unjustified if meant to imply that the longstanding ban against camping is a pretext for suppressing expression. See also Br. 70. A regulation directed at expression always presents a serious First Amendment question, as we noted in our opening brief (at 25 n.21).⁷ But there is no conceivable basis for inferring an intent to suppress expression here, and thus no basis for the support that respondents seek to draw on this point from the government's brief (see Br. 52).

IV.

Respondents' remaining arguments were generally anticipated in our principal brief and require only brief comment.⁸

1. Respondents repeatedly suggest (Br. 63, 66-68) that it is the government's position that the regulation here need only satisfy a "rationality" test in order to withstand First Amendment challenge. The suggestion is false. Assuming that respondents' sleep-in is entitled to First Amendment protection, we argue (see Pet. Br. 31-33) that the "no camping" regulation prohibiting it is valid, not merely because it is "rational," but because it is narrowly tailored to serve a significant government interest. We do contend, however,

became effective, when the Park Service was still operating under the constraints of the decision in *CCNV* and was required to allow "First Amendment camping." In any event, the district court expressly found that that case presented materially different factual circumstances. See Pet. App. 107a-108a.

⁷That, of course, is the teaching of the "nude dancing" cases relied on by respondents (see Br. 43-44, 48-49).

⁸Respondents' contention (Br. 90-93) that the regulations do not prohibit their proposed conduct is fanciful. This contention was correctly and unequivocally rejected by the district court (Pet. App. 101a-102a) and by all 11 judges on the court of appeals (see *id.* at 11a-12a (opinion of Mikva, J.); *id.* at 50a-53a (opinion of Wilkey, J.)).

that the First Amendment does not require invalidation of the regulation simply because it is possible for a court to draft a slightly different regulation, one that would carve out an exception for respondents but still serve the relevant government interests, albeit not as well.

2. Respondents' contention (Br. 83-89) that application of the regulation here serves no substantial government interest is without substance. As noted in our opening brief (at 16, 35-36, 38-39), it cannot seriously be disputed that the Memorial-core area parks are unsuitable for camping, and that the regulation — including its constituent prohibition against spending the nights asleep in tents — is well adapted to preserve park resources. Respondents argue that the regulation need not prohibit sleeping in the parks, because they will refrain from "abusive activity" harmful to the parks (Br. 89). But the First Amendment does not disable the government from regulating conduct that creates a substantial risk of harm. The regulation proceeds on the theory that continuous and intense use of a place — what is commonly called "living" there — constitutes a serious threat to the parks and will place a major strain on the resources available to protect them. Given the minimal impact of the rule on speech interests, this eminently sensible judgment should not be invalidated. See *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. at 654.

3. Respondents urge that the regulation is unconstitutionally broad because it does not make an exception for "expressive" sleep (Br. 74-76).⁹ They acknowledge that such

⁹ Respondents' argument (Br. 57-59) that cases such as *Brown v. Louisiana*, 383 U.S. 131 (1966), and *Edwards v. South Carolina*, 372 U.S. 229 (1963), support their position in this case is mistaken. In both cases vaguely worded ("breach of the peace") statutes were stretched to impose criminal punishment on peaceful and otherwise lawful First Amendment activity engaged in for obviously expressive purposes. The Court held that application of these broadly worded statutes to punish such conduct violated the Constitution. The cases thus stand for the

an exception cannot be created for them alone; the question is whether the government interest in preservation of the parks can be met even if they and others "similarly situated" are allowed to sleep there (Br. 75). Respondents say, without explanation, that there are "few, if any" others similarly situated (Br. 76). But they do not in any way specify criteria for determining who is to be deemed "similarly situated." Is the right to sleep in the parks to be limited to those whose message has a sufficiently strong substantive connection to sleep (such as homelessness) (see Br. 47-49)? Such a rule, rejected by the plurality below (Pet. App. 18a), would involve the Park Service in an ongoing monitoring of the content of the "speech" proposed by particular demonstrators; it would raise extremely serious First Amendment problems. What, then, is the alternative? The government does not, of course, contend that "every member of the general public" will have to be permitted to sleep in Lafayette Park and the Mall (cf. Br. 76). We do submit that, given the attraction of the Memorial-core as a site for vigils and demonstrations, allowing camping in the parks by all demonstrators who claim that an around-the-clock presence is important to conveying their message would create a

proposition that the state may not single out otherwise lawful conduct for punishment because of its expressive content. See *Brown*, 383 U.S. at 142 (plurality opinion); *Edwards*, 372 U.S. at 237. This case presents the exact converse situation: the state has prohibited specific conduct through a general valid prohibition, and respondents claim that their engaging in it must be singled out for an exception because their purpose is allegedly expressive. It's as if, in *Brown*, one of the petitioners had in fact engaged in violence, and then argued that application of the breach of the peace statute was invalid because the purpose of the violence was to convey a message. No case decided by this Court, including the civil rights demonstration cases, suggests that a valid regulation that prohibits conduct for important reasons wholly unrelated to free expression becomes unconstitutional "as applied" as soon as an individual desires to engage in that conduct in order to convey a message. See *Brown*, 383 U.S. at 150 (White, J., concurring).

substantial threat to the resources of the parks and a serious interference with the rights of others who have an equal claim to their use.¹⁰

4. The fundamental problem with respondents' submission is that they are wholly unable to formulate a general rule or principle that would enable the National Park Service to determine who should and who should not be permitted to engage in expressive sleeping in the park. They are content to argue that their sleep-in is "speech," without explaining how the Park Service should deal with similar claims by other groups. On this approach — as under the opinions of the court of appeals — the government is reduced to treating each proposed demonstration on an *ad hoc* basis. One can, of course, readily deduce that, in the absence of a valid general rule, every time a permit to engage in expressive sleeping is denied, litigation will ensue. The result will be that the regulation of demonstrations in the Memorial-core parks will have been taken over by the courts, who will assume the responsibility to determine — on the basis of criteria that, so far at least, continue to be

¹⁰We noted in our opening brief (at 36-38) that it would not be difficult for anyone to construct a facially valid First Amendment justification for camping. And we continue to believe that it would be inappropriate and outside its proper function for the Park Service to inquire into the motives of applicants for demonstration permits. Respondents reply (Br. 80-81) that, in certain circumstances, the government does have to inquire into the sincerity of beliefs. But the fact that such an inquiry may in some cases be required by an Act of Congress or to avoid a "substantial infringement of" freedom of religion (*Sherbert v. Verner*, 374 U.S. 398, 406 (1963)) does not show that it is desirable or appropriate in the context of administering a system of demonstration licenses, much less that it is constitutionally required.

ineffable — when a proposed sleep-in is sufficiently “expressive” to warrant an exception to the no-camping regulation.¹¹

We do not think that the purposes of the First Amendment would be substantially furthered by the creation of such a regime. *Ad hoc* discretionary licensing endangers the First Amendment when administered by the courts as well as when administered by the Executive Branch. We believe that the sounder approach is to allow the National Park Service, which has been entrusted with the duty to manage and preserve the Nation’s parks, to apply its neutral and general rule against using the parks for sleeping accommodations — a rule that has only a trivial impact on the right of the people to communicate and that serves to protect important public interests in the preservation of these parks for their multifarious uses.

¹¹Judge Mikva’s opinion below explicitly foreshadows this development (Pet. App. 29a-30a) (footnote omitted):

Finally, the Park Service cannot mechanically apply its regulations to requests from groups seeking to exercise first amendment rights through sleeping. Although the government can and must retain a “content-neutral” obliviousness to the kind of message which a particular group seeks to express through sleeping, the Park Service cannot be oblivious to the implications of the first amendment — or the attendant complications. Each distinction and each line the Park Service draws in such applications must bear close scrutiny to ensure that symmetry of management does not crowd out first amendment claims.

We doubt that this will be the last occasion that this court will have to undertake the difficult reconciliation of first amendment activities with the necessity for order and management in the Mall and Lafayette Park. In a pluralistic society boasting of its free expression, we can expect no less.

CONCLUSION

For the foregoing reasons and those stated in our opening brief, it is respectfully submitted that the judgment of the district court should be reversed.

REX E. LEE

Solicitor General

PAUL M. BATOR

Deputy Solicitor General

ALAN I. HOROWITZ

Assistant to the Solicitor General

MARCH 1984

FILED

FEB 1 1984

ALEXANDER L. STEVAS.
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

WILLIAM P. CLARK, SECRETARY OF THE INTERIOR, *et al.*,
Petitioners,

—v.—

THE COMMUNITY FOR CREATIVE NON-VIOLENCE, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

**BRIEF OF THE NATIONAL COALITION
FOR THE HOMELESS AS AMICUS CURIAE
IN SUPPORT OF AFFIRMANCE**

OGDEN NORTHROP LEWIS
1 Chase Manhattan Plaza
New York, New York 10005
Tel.: (212) 530-4000
*Attorney for the National Coalition
for the Homeless as Amicus Curiae*

Of Counsel:

ROBERT M. HAYES
National Coalition for the Homeless
105 East 22nd Street
New York, New York 10010
Tel.: (212) 460-8110

ROBERT M. BUSCHMANN
CATHERINE V. CURRY
1 Chase Manhattan Plaza
New York, New York 10005
Tel.: (212) 530-4000

TABLE OF CONTENTS

	PAGE
Table of Authorities	iii
Interest of the <i>Amicus Curiae</i>	1
Introduction.....	2
Statement on the Dimensions and Causes of Homelessness.....	3
A. The Homeless Constitute a Large, Totally Dis- enfranchised Segment of the Nation.....	3
B. Strategies of Survival	6
1. A Safe Place to Sleep.....	6
2. Securing Food	7
3. Hygiene.....	8
C. Factors Leading to Homelessness	9
1. Housing	9
2. Unemployment	10
3. Reductions in Aid Programs.....	12
4. Deinstitutionalization	13
D. Consequences: Survival and Death.....	14
Summary of Argument	16
Argument.....	17
I. SLEEPING OUTDOORS IN WINTER, WITHIN THE CONTEXT OF RESPONDENTS' PRO- POSED DEMONSTRATION, IS PROTECTED EXPRESSIVE CONDUCT UNDER THE FIRST AMENDMENT	17

II. THE NEW NATIONAL PARK SERVICE "ANTI-CAMPING" REGULATIONS ARE UN- CONSTITUTIONAL AS APPLIED TO RE- SPONDENTS' PROPOSED SLEEPING	23
A. An Absolute Ban on an Expressive Activity in a Public Forum Traditionally Associated with a Broad Range of First Amendment Activities Is Justified Only If It Is Necessary to a Signifi- cant Government Interest	23
B. Petitioners Have Failed to Demonstrate Any Significant Government Interest Which Will Be Served by Denying Respondents the Right to Engage in Expressive Sleeping at Their Symbolic Campsites	26
1. Petitioners Have Demonstrated No Fac- tual Basis for Their Asserted Interest in Prohibiting Respondents from Sleeping ..	26
2. A Total Ban on Respondents' Proposed Sleeping Is Not Necessary to Petitioners' Asserted Interest	29
Conclusion	30

TABLE OF AUTHORITIES

Cases	PAGE
<i>A Quaker Action Group v. Morton</i> , No. 71-1276 (D.C. Cir. Apr. 19, 1971), <i>vacated mem.</i> , 402 U.S. 926 (1971)	22
<i>Abrams v. United States</i> , 250 U.S. 616 (1919).....	19
<i>Brown v. Louisiana</i> , 383 U.S. 131 (1966).....	17, 19, 20
<i>Callahan v. Carey</i> , N.Y.L.J., Dec. 11, 1979, at 10, col. 4 (N.Y. Sup. Ct. Dec. 5, 1979).....	5
<i>Cohen v. California</i> , 403 U.S. 15 (1971).....	25
<i>Community for Creative Non-Violence v. Watt</i> , 670 F.2d 1213 (D.C. Cir. 1982).....	28
<i>Edwards v. South Carolina</i> , 372 U.S. 229 (1963)	17, 20
<i>Garner v. Louisiana</i> , 368 U.S. 157 (1961)	19
<i>Gregory v. City of Chicago</i> , 394 U.S. 111 (1969)	17
<i>Hague v. CIO</i> , 307 U.S. 496 (1939).....	24
<i>Mandel v. Bradley</i> , 432 U.S. 173 (1977)	22
<i>Metromedia, Inc. v. City of San Diego</i> , 453 U.S. 490 (1981)	22
<i>Morton v. Quaker Action Group</i> , 402 U.S. 926 (1971) .	22
<i>New York Times Co. v. United States</i> , 403 U.S. 713 (1971)	29
<i>Organization for a Better Austin v. Keefe</i> , 402 U.S. 415 (1971)	25
<i>Perry Education Association v. Perry Local Educators' Association</i> , ____ U.S. ____, 103 S.Ct. 948 (1983) ...	24, 29
<i>Price v. Cohen</i> , 715 F.2d 87 (3d Cir. 1983).....	12
<i>Schneider v. State</i> , 308 U.S. 147 (1939)	18

<i>Shuttlesworth v. City of Birmingham</i> , 394 U.S. 147 (1969)	17, 29
<i>Spence v. Washington</i> , 418 U.S. 405 (1974)	16, 18, 19, 21, 22, 27
<i>Street v. New York</i> , 394 U.S. 576 (1969)	27
<i>Stromberg v. California</i> , 283 U.S. 359 (1931)	18
<i>Thornhill v. Alabama</i> , 310 U.S. 88 (1940)	18
<i>Tinker v. Des Moines School District</i> , 393 U.S. 503 (1969)	18, 20, 21, 22, 27, 28-29
<i>United States v. Carolene Products Co.</i> , 304 U.S. 144 (1938)	29
<i>United States v. Grace</i> , ____ U.S. ____, 103 S. Ct. 1702 (1983)	24, 25
<i>United States v. O'Brien</i> , 391 U.S. 367 (1968)	25, 26, 29
<i>Winters v. New York</i> , 333 U.S. 507 (1948)	25

Federal Regulations

36 C.F.R.:

Section 50.19(e)(8) (1982)	23
Section 50.19(d)(1) (1983)	28
Section 50.19(d)(3) (1983)	27
Section 50.19(e)(2) (1983)	27
Section 50.19(e)(5) (1983)	28
Section 50.19(e)(5)(i) (1983)	27
Section 50.19(e)(8) (1983)	23
Section 50.19(e)(11) (1983)	28

Legislative Materials

<i>Homelessness in America: Hearing Before the Sub- comm. on Housing and Community Development of the House Comm. on Banking, Finance and Urban Affairs</i> , 97th Cong., 2nd Sess. (1982)	4, 6, 7
--	---------

<i>The Poverty Rate Increase: Hearing Before the Subcomm. on Public Assistance and Unemployment Compensation of the House Comm. on Ways and Means, 98th Cong., 1st Sess. 1 (October 18, 1983) (statement of Gary Burtless, Brookings Institution) ..</i>	11
--	----

State Constitutions and Statutes

ALA. CONST. art. VIII, § 178	5
ALASKA STAT. §§ 15.05.010, 15.07.060 (1982)	5
ARIZ. REV. STAT. ANN. §§ 16-121, 16-152 (Supp. 1983)	5
ARK. CONST. art. III, § 1	5
CAL. CONST. art. II, § 2; CAL. ELEC. CODE § 500 (West Supp. 1982); § 207 (West 1977)	5
COLO. REV. STAT. § 1-2-101 (1980), §§ 1-2-102, 1-2-202-203 (Supp. 1982)	5
CONN. GEN. STAT. ANN. §§ 9-12, 9-27 (West Supp. 1982)	5
DEL. CODE ANN. tit. 15, §§ 1302, 1701 (1981)	5
D.C. CODE ANN. §§ 1-1302 (2)(A) (1981), 1-1311 (Supp. 1983)	5
FLA. STAT. ANN. §§ 97.041, 98.111 (West 1982)	5
GA. CODE ANN. §§ 21-2-219, 21-2-217 (Supp. 1983) ...	5
HAWAII REV. STAT. §§ 11-12, 11-15 (1976)	5
IDAHO CODE §§ 34-402, 34-412 (Supp. 1983)	5
ILL. ANN. STAT. ch. 46, §§ 3-1, 3-2, 4-8 (Smith-Hurd Supp. 1982)	5
IND. CODE ANN. § 3-1-7-9 (Burns Supp. 1983), § 3-1-7-26 (Burns 1982)	5
IOWA CONST. art. II, § 1; IOWA CODE ANN. § 48.6 (West Supp. 1982)	5

	PAGE
KAN. CONST. art. V, § 1; KAN. STAT. ANN. § 25-2309 (1981)	5
KY. REV. STAT. ANN. § 116.025 (Bobbs-Merrill Supp. 1982), § 116.049 (Bobbs-Merrill 1982).....	5
LA. REV. STAT. ANN. § 18:101 (West 1979), § 18:104 (West Supp. 1982).....	5
ME. REV. STAT. ANN. tit. 21, § 41.1 (1964), § 201 (Supp. 1983).....	5
MD. ANN. CODE art. 33, §§ 3-4, 3-6 (1983).....	5
MASS. ANN. LAWS ch. 51, §§ 1, 1-A (Michie/Law. Co-op. 1978)	5
MICH. STAT. ANN. §§ 6.1492, 6.1495 (Callaghan 1983)	5
MINN. STAT. ANN. §§ 201.014, 201.071 (West Supp. 1982).....	5
MISS. CONST. art. XII, § 241 (amended 1972); MISS. CODE ANN. § 23-5-303 (Supp. 1983).....	5
MO. ANN. STAT. §§ 115.133, 115.155 (Vernon 1980), § 115.132 (Vernon Supp. 1984).....	5
MONT. CODE ANN. § 13-1-111 (1983)	5
NEB. REV. STAT. §§ 32-102, 32-223 (1978).....	5
NEV. REV. STAT. §§ 293.485, 293.517, 293.530 (1981) ...	5-6
N.H. REV. STAT. ANN. §§ 654.1, 654.7 (Supp. 1983) ...	6
N.J. STAT. ANN. §§ 19:31-5, 19:31-3 (West Supp. 1983)	6
N.M. CONST. art. VII, § 1; N.M. STAT. ANN. § 1-4-20 (1978)	6
N.Y. ELEC. LAW §§ 5-102, 5-500 (McKinney 1978).....	6
N.C. GEN. STAT. §§ 163-55, 163-72 (1982)	6
N.D. CENT. CODE § 16.1-01-04 (1981)	6

OHIO REV. CODE ANN. § 3503.07 (Page 1972), § 3503.14 (Page Supp. 1982).....	6
OKLA. CONST. art. III, § 1; OKLA. STAT. ANN. tit. 26, § 4-112 (West Supp. 1983).....	6
OR. CONST. art. II, § 2; OR. REV. STAT. § 247.121 (1981)	6
PA. STAT. ANN. tit. 25, §§ 623-21, 623-19-20 (Purdon Supp. 1982)	6
R.I. GEN. LAWS §§ 17-1-3, 17-9-6 (Supp. 1983)	6
S.C. CODE ANN. §§ 7-5-120, 7-5-170 (Law. Co-op. 1977).....	6
S.D. CODIFIED LAWS ANN. §§ 12-3-1, 12-4-7.3 (1982)..	6
TENN. CODE ANN. §§ 2-2-102, 2-2-116 (Supp. 1983) ...	6
TEX. ELEC. CODE ANN. §§ 5.02, 5.13b (Vernon Supp. 1982).....	6
UTAH CODE ANN. §§ 20-1-17, 20-2-11 (Supp. 1983)....	6
VT. STAT. ANN. tit. 17, §§ 2121, 2145 (1982)	6
VA. CODE §§ 24.1-41, 24.1-22 (1980).....	6
WASH. CONST. art. VI, § 1 (amended 1974); WASH. REV. CODE ANN. § 29.07.070 (Supp. 1982).....	6
W. VA. CONST. art. IV, § 1; W. VA. CODE § 3-2-19 (1979)	6
WIS. STAT. ANN. §§ 6.02, 6.15, 6.33 (West Supp. 1983)	6
WYO. STAT. §§ 22-3-102, 22-3-103 (1977)	6

Other Authorities

Andersen, <i>Left Out in the Cold</i> , Time, Dec. 19, 1983, at 14	3, 11
N. Anderson, <i>Report on the Municipal Lodging House in New York City</i> (1932)	11

E. Baxter & K. Hopper, <i>Private Lives/Public Spaces: Homeless Adults on the Streets of New York City</i> (1981)	3, 7, 8, 9, 14, 15
Baxter & Hopper, <i>The New Mendicancy</i> , 52 <i>Amer. J. Orthopsychiat.</i> 393 (1982)	15
Baxter & Hopper, <i>Troubled on the Streets: The Mentally Disabled Homeless Poor</i> , in <i>The Chronic Mental Patient: Five Years Later</i> (J. Talbott ed.) (forthcoming)	13
M. Begun, <i>Misconceptions of Homelessness: Statement to the Metropolitan Council, American Jewish Congress</i> (Mar. 10, 1983)	16
Boston Globe, Nov. 24, 1983, at 2, col. 5	11, 16
S. Brezenoff, Commissioner of the Human Resources Administration, Testimony before the General Welfare Committee of the New York City Council (Jan. 26, 1981)	7
Coalition for the Homeless, <i>Empty Promises/Empty Plates: Hunger in New York City</i> (1983)	7
M. Cuomo, 1933/1983— <i>Never Again: A Report to the National Governors' Association Task Force on the Homeless</i> (1983)	3, 4, 6, 7, 8, 10, 13, 14
J. Ely, <i>Democracy and Distrust: A Theory of Judicial Review</i> (1980)	26, 29
Ely, <i>Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis</i> , 88 <i>Harv. L. Rev.</i> 1482 (1975)	26
Fessler, <i>Senators Press Action to Ease Disability Review Procedures</i> , 40 <i>Cong. Q. Weekly Rep.</i> 2242 (1982)...	12-13
C. Green, <i>Housing Single, Low-Income Individuals</i> (1982)	10
Hartman, ed., <i>America's Housing Crisis</i> (1983)	10

	PAGE
C. Hartman, D. Keating & R. LeGates, <i>Displacement: How to Fight It</i> (1982).....	10
Hennepin County Office of Planning & Development, <i>A Survey of Clients in Emergency Shelters</i> (1983).....	8
M. Hombs & M. Snyder, <i>Homelessness in America: A Forced March to Nowhere</i> (1982)	3, 6, 12, 14
N. Kaufman & J. Harris, <i>Profile of the Homeless in Massachusetts</i> (1983)	11
R. Lander, <i>Health Needs of the Homeless</i> (1983)	15
Leepson, <i>The Homeless: A Growing National Problem</i> , 11 Editorial Research Reports 796 (1982)	13
W. Leuchtenberg, <i>Franklin D. Roosevelt and the New Deal</i> (1963).....	3
F. Levy & R. Michel, <i>The Way We'll Be in 1984: Recent Changes in the Level and Distribution of Disposable Income</i> (1983)	13
L.A. Times, Dec. 26, 1982, § 1, at 1, col. 1	6
Low Income Housing Information Service, <i>Special Memorandum No. 18</i> (1983).....	10
National Coalition for the Homeless, <i>The Homeless and the Economic Recovery</i> (1983)	4, 11, 12
National Low Income Housing Coalition, <i>Call to Action</i> (July 1, 1983).....	9
N.Y.C. Human Resources Administration, <i>Study of Long-Term Keener Clients</i> (May 1982), reprinted in <i>Homelessness in America: Hearing Before the Subcomm. on Housing and Community Development of House Comm. on Banking, Finance and Urban Affairs</i> , 97th Cong., 2nd Sess. 194.....	11
N.Y. Sunday News, Jan. 15, 1984, § 1, at 5, col. 1.....	8

	PAGE
N.Y. Times, Mar. 25, 1980, at B1, col. 2	7
N.Y. Times, Jan. 2, 1983, § 6 (Magazine) at 21, col. 1	8
N.Y. Times, June 8, 1983, at A17, col. 1	13
N.Y. Times, Sept. 9, 1983, at D17, col. 1	11
N.Y. Times, Sept. 23, 1983, at B10, col. 3	10
N.Y. Times, Oct. 19, 1983, at A22, col. 1	9, 12
N.Y. Times, Dec. 19, 1983, at A17, col. 1	8
N.Y. Times, Dec. 27, 1983, at A1, col. 1	15-16
N.Y. Times, Jan. 23, 1984, at A1, col. 5	4
N.Y. Times, Jan. 23, 1984, at A20, col. 1	5
Pepper & Ryglewicz, <i>Testimony for the Neglected: The Mentally Ill in the Post-Deinstitutionalized Age</i> , 52 Amer. J. of Orthopsychiat. 388 (1982)	14
Reich, <i>Care of the Chronically Mentally Ill: A National Disgrace</i> , 130 Am. J. Psychiatry 911 (1973)	14
<i>Report of the Governor's Task Force on the Homeless</i> (1983)	4-5
The Robert Wood Johnson Foundation & The Pew Memorial Trust, <i>Health Care for the Homeless Program</i> (1983)	3
Savannah Evening Press, Feb. 1, 1983, at 13, col. 2 ...	16
Segal & Baumohl, <i>Engaging the Disengaged: Proposals on Madness and Vagrancy</i> , 25 Social Work 358 (1980)	15
Segal & Specht, <i>A Poorhouse in California, 1983: Oddity or Prelude?</i> , 28 Social Work 19 (1983)	15
K. Stallard, B. Ehrenreich & H. Sklar, <i>Poverty in the American Dream</i> (1983)	13
L. Stark, K. MacDonald-Evoy & A. Sage, <i>A Day in June</i> (1983)	8

	PAGE
Statement of Governor Thomas H. Kean (Oct. 24, 1983) (discussing findings of the Task Force on the Homeless).....	5
E. Sutherland & H. Locke, <i>Twenty Thousand Homeless Men</i> (1936).....	15
Talbott, <i>Care of the Chronically Mentally Ill: Still A National Disgrace</i> , 136 Am. J. Psychiatry 688 (1979)	14
Task Force on Emergency Shelter, <i>Homelessness in Chicago</i> (1983).....	7
U.S. Department of Commerce, Bureau of the Census, <i>Money Income and Poverty Status of Families and Persons in the United States: 1982</i> , P-60 Current Population Reports 20 (1983).....	9
U.S. Department of Health and Human Services, HHS News, Nov. 25, 1983	3
U.S. Department of Labor, <i>Current Labor Statistics</i> , 106 Monthly Labor Review 49 (July 1983)	10
U.S. Department of Labor, <i>Current Labor Statistics</i> , 106 Monthly Labor Review 68 (December 1983).....	12
Wash. Post, Dec. 15, 1982, at B12, col. 2	15
Wash. Post, Jan. 24, 1983, at D1, col. 4	7
K. Winograd, <i>Street People and Other Homeless—A Pittsburgh Study</i> (1983).....	7

IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

No. 82-1998

WILLIAM P. CLARK, SECRETARY OF THE INTERIOR, *et al.*,
Petitioners,

—v.—

THE COMMUNITY FOR CREATIVE NON-VIOLENCE, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

**BRIEF OF THE NATIONAL COALITION
FOR THE HOMELESS AS *AMICUS CURIAE***

INTEREST OF *AMICUS CURIAE*

The National Coalition for the Homeless is a not-for-profit corporation established in 1981. It serves as an umbrella federation for hundreds of organizations, agencies and individuals throughout the country committed to the principle that the provision of decent shelter is a prime obligation of a civilized society. The Coalition is directed by a national coordinating committee with representatives from approximately 40 cities and regions throughout the United States.

The Coalition has a special interest in the issues before the Court. A primary activity of the Coalition is that of bringing

the plight of the homeless to the attention of the American people and various government authorities. The Coalition has found that a recognition and understanding of homelessness frequently translates into support for public policies that aid the homeless.

This *amicus* brief outlines the dimensions of homelessness in America in order to make clear the significance of sleeping in respondents' proposed demonstration.¹ Sleep, in the context of the demonstration, is crucial not only because of its central symbolism, but also because without it the message of the demonstration is lost. In addition, the magnitude of homelessness in this country is far greater than most realize. Without effective demonstration, the homeless simply have no way even to begin to get across the problems detailed in this brief.

INTRODUCTION

Respondents applied for a National Park Service permit to hold a 24-hour-a-day demonstration in Lafayette Park and on the Mall which would include sleeping outdoors in wintertime in these highly visible public parks to communicate to the public the plight of the homeless in America. The Park Service granted respondents a permit to maintain a 24-hour-a-day presence at the demonstration sites, to set up tents, to sit and lie down on blankets in and around the tents, and to feign sleeping. However, it refused respondents' application to be allowed actually to sleep as part of their demonstration, on the basis that sleeping in this context would violate the Park Service's regulations against camping. Respondents urge that the Court affirm the Court of Appeals' determination, 703 F.2d 586 (D.C. Cir. 1983), that the Park Service's "anti-camping" regulations, as applied to respondents' proposed sleeping activities, unconstitutionally violated respondents' First Amendment right of speech. The National Coalition for the Homeless respectfully submits this brief similarly urging affirmation.

¹ The parties have consented to the filing of this brief, and documents conferring consent have been filed with the Clerk of the Court pursuant to Supreme Court Rule 36.2.

STATEMENT ON THE DIMENSIONS AND CAUSES OF HOMELESSNESS

A. The Homeless Constitute a Large, Totally Disenfranchised Segment of the Nation

Establishing with precision the number of homeless² persons in the United States, or in any single region, is impossible, but there is no question that the number is high and that the problem is national, rural as well as urban. Current estimates of the number of homeless persons in the United States range from two to three million.³

With respect to individual regions, a compilation by the National Governors' Association in 1983 of estimates of the number of homeless in various cities shows the national scope of the problem. In New York City, 60,000 homeless men, women and children were seen by public and private agencies during 1982. *Report to the National Governors' Association, supra*, at 16. Estimates of the number of homeless range up to 25,000 in Chicago; 30,000 in Los Angeles; 8,000 in Philadelphia; over 7,600 in St. Louis; 10,000 in San Francisco; 3,800

2 As used herein, the term "homeless" includes all those "whose primary nighttime residence is either in the publicly or privately operated shelters or in the streets, in doorways, train stations and bus terminals, public plazas and parks, subways, abandoned buildings, loading docks and other well-hidden sites known only to their users." E. Baxter & K. Hopper, *Private Lives/Public Spaces: Homeless Adults on the Streets of New York City* 6-7 (1981) (hereinafter cited as *Private Lives/Public Spaces*). Such definition encompasses the individual homeless respondents in this action. See also M. Cuomo, 1933/1983—*Never Again: A Report to the National Governors' Association Task Force on the Homeless* 15 (1983) (hereinafter cited as *Report to the National Governors' Association*).

3 Compare estimate of the United States Department of Health and Human Services, HHS News, Nov. 25, 1983, at 1 (two million homeless Americans), with estimate of Community for Creative Non-Violence, M. Homb's and M. Snyder, *Homelessness in America: A Forced March to Nowhere* xvi (1982) (hereinafter cited as *Homelessness in America*) (between two and three million homeless Americans). See also The Robert Wood Johnson Foundation & The Pew Memorial Trust, *Health Care for the Homeless Program* 5 (1983). At the height of the Great Depression there were believed to be somewhere between one and two million homeless Americans. See Andersen, *Left Out in the Cold*, Time, Dec. 19, 1983, at 14-15; W. Leuchtenberg, *Franklin D. Roosevelt and the New Deal* 2-3 (1963).

in St. Joseph, Missouri; over 2,500 in Worcester, Massachusetts; and 3,000 in Phoenix. *Id.* at 16-18. A state task force appointed by Governor Kean of New Jersey has reported a minimum of 20,000 homeless in that state. *Report of the Governor's Task Force on the Homeless* 2 (1983). Mayor Ted L. Wilson of Salt Lake City has estimated 1,000 homeless in his city. *Homelessness in America: Hearing Before the Subcomm. on Housing and Community Development of the House Comm. on Banking, Finance and Urban Affairs*, 97th Cong., 2nd Sess. 164 (1982) (hereinafter cited as *Congressional Hearing*). Homelessness is also prevalent in rural areas, though often the rural homeless are "invisible" because they are widely dispersed and many eventually migrate to urban centers. *Report to the National Governors' Association*, *supra*, at 19.

Everywhere, the problem of homelessness is growing.⁴ Available shelter space has not kept pace with the increasing number of homeless persons: "few would dispute the claim that, in the course of the last few years, homelessness in the United States has quietly taken on crisis proportions." *Report to the National Governors' Association*, *supra*, at 18; see also National Coalition for the Homeless, *The Homeless and the Economic Recovery* 1 (1983) (hereinafter cited as *The Homeless and the Economic Recovery*). A special assistant to the Mayor of Seattle has reported that 2,466 homeless people were turned away in a single month from Seattle's emergency shelter network. *Congressional Hearing*, *supra*, at 383. During its first year of service, in 1982, Loreto House, an emergency shelter for women and children in Holyoke, Massachusetts, turned away 3,000 homeless women and children. *Id.* at 511 (statement of Pat O'Connell, Western Massachusetts Coalition for the Homeless). In New Jersey, only 700 beds were reported to be available to a homeless population estimated at 20,000. *Report of the Governor's Task Force on the Homeless*, *supra*,

4 According to the Daily Shelter Census Statistics of the New York City Human Resources Administration, the number of homeless families in emergency shelters in New York City increased by 100 per cent in the 12 months ending December 1983, and the number of homeless single men and women in city shelters rose 40 per cent during the same period. The deputy commissioner of the city's Human Resources Commission recently reported that more people spent the night in city shelters than at any time since the Depression. N.Y. Times, Jan. 23, 1984, at A1, col. 5.

at 2; Statement of Governor Thomas H. Kean, at 5 (October 24, 1983) (discussing findings of the Task Force on the Homeless).

Despite the increasing size and diversity of the homeless population, homeless persons in America have no access to traditional political channels: "[T]he homeless have no political influence. Only publicity, moral pressure and an occasional court decision can prompt attention to their needs." N.Y. Times, Jan. 23, 1984, at A20, col. 1.⁵ The traditional means by which groups in America call attention to and improve their conditions, such as organizing, lobbying, petitioning their representatives, advertising in newspapers, on radio and television, and manning telephone banks, are unavailable to those who have no residence of any kind. In every state, to be without a home is to be disenfranchised, since the lack of a mailing address or other proof of residence within the state disqualifies the homeless from registering to vote.⁶

5 See also *Callahan v. Carey*, N.Y.L.J., Dec. 11, 1979, at 10, col. 4 (N.Y. Sup. Ct. Dec. 5, 1979) (holding that, under New York law, New York State and New York City are required to provide shelter to the homeless).

6 See, e.g., ALA. CONST. art. VIII, § 178; ALASKA STAT. §§ 15.05.010, 15.07.060 (1982); ARIZ. REV. STAT. ANN. §§ 16-121, 16-152 (Supp. 1983); ARK. CONST. art. III, § 1; CAL. CONST. art. II, § 2; CAL. ELEC. CODE § 500 (West Supp. 1982), but see § 207 (West 1977); COLO. REV. STAT. § 1-2-101 (1980), §§ 1-2-102, 1-2-202-203 (Supp. 1982); CONN. GEN. STAT. ANN. §§ 9-12, 9-27 (West Supp. 1982); DEL. CODE ANN. tit. 15, §§ 1302, 1701 (1981); D.C. CODE ANN. § 1-1302(2)(A)(1981), § 1-1311 (Supp. 1983); FLA. STAT. ANN. §§ 97.041, 98.111 (West 1982); GA. CODE ANN. §§ 21-2-219, 21-2-217 (Supp. 1983); HAWAII REV. STAT. §§ 11-12, 11-15 (1976); IDAHO CODE §§ 34-402, 34-412 (Supp. 1983); ILL. ANN. STAT. ch. 46, §§ 3-1, 3-2, 4-8 (Smith-Hurd Supp. 1982); IND. CODE ANN. § 3-1-7-9 (Burns Supp. 1983), § 3-1-7-26 (Burns 1982); IOWA CONST. art. II, § 1, IOWA CODE ANN. § 48.6 (West Supp. 1982); KAN. CONST. art. V, § 1, KAN. STAT. ANN. § 25-2309 (1981); KY. REV. STAT. ANN. § 116.025 (Bobbs-Merrill Supp. 1982), § 116.049 (Bobbs-Merrill 1982); LA. REV. STAT. ANN. § 18:101 (West 1979), § 18:104 (West Supp. 1982); ME. REV. STAT. ANN. tit. 21, § 41.1 (1964), § 201 (Supp. 1983); MD. ANN. CODE art. 33 §§ 3-4, 3-6 (1983); MASS. ANN. LAWS ch. 51, §§ 1, 1-A (Michie/Law. Co-op. 1978); MICH. STAT. ANN. §§ 6.1492, 6.1495 (Callaghan 1983); MINN. STAT. ANN. §§ 201.014, 201.071 (West Supp. 1982); MISS. CONST. art. XII, § 241 (amended 1972), MISS. CODE ANN. § 23-5-303 (Supp. 1983); MO. ANN. STAT. §§ 115.133, 115.155 (Vernon 1980), § 115.132 (Vernon Supp. 1984); MONT. CODE ANN. § 13-1-111 (1983); NEB. REV. STAT. §§ 32-102, 32-223 (1978); NEV. REV. STAT.

B. Strategies of Survival

The exigencies of everyday life for the homeless turn on three essential needs: a safe place to sleep, sufficient food (either purchased, begged, or received through soup kitchens and breadlines) and access to toilet and sanitary facilities.

1. A Safe Place to Sleep

The central pursuit in the daily life of any homeless person is the quest for shelter, secure from the elements and from crime. This constant effort is definitive of the homeless way of life. In Pittsburgh, homeless men sleep in caves above the Allegheny River. *Report to the National Governors' Association, supra*, at 58. In Atlanta, homeless people live under the bridges of interstate highways. *Congressional Hearing, supra*, at 468 (statement of Rev. Eduard Loring, Director, Open Door Community). In Los Angeles and in Texas, homeless families, many having migrated from northern industrial cities, sleep in abandoned automobiles. *Congressional Hearing, supra*, at 380 (statement of Kevin Moriarity, Director, Human Resources and Services, San Antonio, Texas); L.A. Times, Dec. 26, 1982, § 1, at 1, col. 1. In Washington, D.C., the homeless exploit the free steam escaping from the heating grates around the city. *Homelessness in America, supra*, at 109.

§§ 293.485, 293.517, 293.530 (1981); N.H. REV. STAT. ANN. §§ 654.1, 654.7 (Supp. 1983); N.J. STAT. ANN. §§ 19:31-5, 19:31-3 (West Supp. 1983); N.M. CONST. art. VII, § 1, N.M. STAT. ANN. § 1-4-20 (1978); N.Y. ELEC. LAW §§ 5-102, 5-500 (McKinney 1978); N.C. GEN. STAT. §§ 163-55, 163-72 (1982); N.D. CENT. CODE § 16.1-01-04 (1981); OHIO REV. CODE ANN. § 3503.07 (Page 1972), § 3503.14 (Page Supp. 1982); OKLA. CONST. art. III, § 1, OKLA. STAT. ANN. tit. 26, § 4-112 (West Supp. 1983); OR. CONST. art. II, § 2, OR. REV. STAT. § 247.121 (1981); PA. STAT. ANN. tit. 25, §§ 623-21, 623-19-20 (Purdon Supp. 1982); R.I. GEN. LAWS §§ 17-1-3, 17-9-6 (Supp. 1983); S.C. CODE ANN. §§ 7-5-120, 7-5-170 (Law. Co-op. 1977); S.D. CODIFIED LAWS ANN. §§ 12-3-1, 12-4-7.3 (1982); TENN. CODE ANN. §§ 2-2-102, 2-2-116 (Supp. 1983); TEX. ELEC. CODE ANN. §§ 5.02, 5.13b (Vernon Supp. 1982); UTAH CODE ANN. §§ 20-1-17, 20-2-11 (Supp. 1983); VT. STAT. ANN. tit. 17, §§ 2121, 2145 (1982); VA. CODE §§ 24.1-41, 24.1-22 (1980); WASH. CONST. art. VI, § 1 (amended 1974), WASH. REV. CODE ANN. § 29.07.070 (Supp. 1982); W. VA. CONST. art. IV, § 1, W. VA. CODE § 3-2-19 (1979); WIS. STAT. ANN. §§ 6.02, 6.15, 6.33 (West Supp. 1983); WYO. STAT. §§ 22-3-102, 22-3-103 (1977).

In New York and Washington, D.C., phone booths serve as places to sleep for some of the homeless. *Private Lives/Public Spaces*, *supra*, at 84-a; Wash. Post, Jan. 24, 1983, at D1, col. 4. In Chicago, many homeless make use of unattended cars and trucks, sheltered spots under bridges or in back alleys, and the city parks; for others, the public transportation system provides regular mobile sleeping quarters. Task Force on Emergency Shelter, *Homelessness in Chicago* 40 (1983). In Cleveland, Ohio, and Birmingham, Alabama, Salvation Army officials have found clothing collection boxes appropriated as makeshift shelters by the people for whom the discarded clothing was intended. *Congressional Hearing*, *supra*, at 70; *Report to the National Governors' Association*, *supra*, at 20. Cardboard boxes have been pressed into service as shelter by the homeless in San Francisco and New York. *Private Lives/Public Spaces*, *supra*, at 99; *Report to the National Governors' Association*, *supra*, at 63. Still others among the homeless, in New York, Boston and Pittsburgh, among other cities, find temporary respite in abandoned buildings with no heat, plumbing or windows. N.Y. Times, Mar. 25, 1980, at B1, col. 2; *Private Lives/Public Spaces*, *supra*, at 87; K. Winograd, *Street People and Other Homeless—a Pittsburgh Study* 7 (1983). The pattern is simple: where refuge can be found or fashioned, it is being used.⁷

2. Securing Food

Securing food or the funds needed to purchase food is a similarly debilitating task for the homeless. Demand for food far outstrips the meals provided by voluntary kitchens. See, e.g., Coalition for the Homeless, *Empty Promises/Empty Plates: Hunger in New York City* 1 (1983); *Report to the National Governors' Association*, *supra*, at 9-13. The portrait

⁷ The most extensive research into the search for a secure place to sleep has been conducted in New York City. One common tactic, particularly for women, is to walk the streets all night, then find a few hours of sleep during daylight hours in church pews or train stations (which are safer in daytime). *Private Lives/Public Spaces*, *supra*, at 75. The New York Transit Authority has estimated that 6,000 homeless persons sleep in the subway system each night. Testimony of S. Brezenoff, Commissioner of the Human Resources Administration, before the General Welfare Committee of the New York City Council (Jan. 26, 1981).

of the poor rummaging through trash cans and garbage dumpsters has become commonplace. N.Y. Times, Jan. 2, 1983, § 6 (Magazine), at 21, col. 1.

Where food cannot be obtained, the homeless strive for the dollars needed to purchase it. This, like the quest for sleeping space, becomes an all-consuming activity. Day labor is now very scarce on America's skid rows, *Report to the National Governors' Association, supra*, at 4, and begging is considered too shameful by many of the homeless. *Private Lives/Public Spaces, supra*, at 83-84. In many cities, the homeless recover waste aluminum, gaining little more than a few cents per pound for their labor. L. Stark, K. MacDonald-Evoy & A. Sage, *A Day in June* 5 (1983) (hereinafter cited as *A Day in June*). In states with "bottle bills," scavenging becomes slightly more lucrative: up to a few dollars a day can be earned. N.Y. Sunday News, Jan. 15, 1984, § 1, at 5, col. 1. In Minneapolis, a December 1982 survey of the homeless in emergency shelters found that over 35 per cent sold plasma to blood banks as a source of income. Hennepin County Office of Planning & Development, *A Survey of Clients in Emergency Shelters* 10 (1983). In Phoenix, 25% of 181 homeless individuals interviewed on a single day in June 1983 had either sold blood or scrap aluminum that day. *A Day in June, supra*, at 5.

3. Hygiene

The quest of the homeless for minimal hygiene is exacting. Most cities in the United States have few, if any, public toilets, and public baths are now virtually extinct. *Private Lives/Public Spaces, supra*, at 80. While it has been found that filth and odor are used by some homeless women as a conscious defense against intruders, the overriding fact is the unavailability of facilities for the hygiene needs of the homeless. *Id.* In New York, "for the penniless, public bathrooms, bathing and laundry facilities are so scarce, and the access to them so limited, that cleanliness is virtually impossible." *Private Lives/Public Spaces, supra*, at 80. In Atlanta, business leaders are fighting a proposal to create public bathrooms because, the businessmen say, toilets will only serve to "spawn crime." N.Y. Times, Dec. 19, 1983, at A17, col. 1. The effort to maintain some standard of cleanliness is strenuous, even painstaking, for the homeless.

C. Factors Leading to Homelessness

There is no single path to homelessness, but whatever the mix of factors, they relate heavily to the actions and inactions of Federal, state and local governments. A principal explanation is that housing has become a scarce resource. Competition for that resource has become fierce, and the losers are the weakest of the poor—the mentally disabled, elderly, physically infirm, ill-educated, structurally unemployed and single parent families.

At the same time that the housing market for the poor has contracted, their resources to pay for housing have decreased. The most common antecedent to homelessness is loss of income. This typically occurs through loss of work combined with exhaustion of all savings and unemployment benefits and cut-backs in various aid programs.⁸ Poor households have been especially hard hit by the failure of income to keep pace with inflation.⁹ Moreover, the capacity of low income persons to compete for housing has been reduced by the failure of public or private agencies to provide after-care support to disabled persons and community-based care to the mentally ill. *Private Lives/Public Spaces*, *supra*, at 38-40. Personal circumstances, such as the loss of the principal means of support, through death, disability or abandonment, conspire with these economic and social forces to render a person or family homeless. *Id.* at 40.

1. Housing

Each year 2.5 million Americans are displaced from their homes due to revitalization of neighborhoods, eviction,

8 The poverty rate in the United States has increased in recent years—it now stands officially at 15%, or 34.4 million Americans, the highest in 17 years, according to most recent statistics. U.S. Department of Commerce, Bureau of the Census, *Money Income and Poverty Status of Families and Persons in the United States: 1982*, P-60 Current Population Reports 20 (1983); N.Y. Times, Oct. 19, 1983, at A22, col. 1.

9 Between 1970 and 1980, median income of renters increased 67%, while median rent increased 123%. In addition, almost all households with income below \$5,000 pay more than half their income for shelter, while those with income of over \$20,000 generally pay roughly a quarter of their income for shelter. National Low Income Housing Coalition, *Call to Action 5* (July 1, 1983).

economic development and rent inflation. C. Hartman, D. Keating & R. LeGates, *Displacement: How to Fight It* 3 (1982) (hereinafter cited as *Displacement*). Over the past decade, most cities have created incentives for the revitalization of downtown areas, a process sometimes called "gentrification," and the poor cannot afford the inflated rents that result. Between 1975 and July 1981 in New York City, 66 per cent of low rent single room occupancy hotels were lost. C. Green, *Housing Single, Low-Income Individuals* 6-7 (1982). This problem is not limited to urban areas or to rental housing:

"The Mortgage Bankers Association reports that one hundred and thirty thousand Americans lost their homes due to foreclosure in 1982. Farming regions were especially hard hit. . . . In Illinois, foreclosures have risen 25-30% in the last fifteen months. . . ." *Report to the National Governors' Association, supra*, at 38.

Replacement housing for the poor is often unavailable. See generally C. Hartman, ed., *America's Housing Crisis* (1983). The private housing market since World War II has been unable to create adequate low income housing. Federal support for low income housing has waned since the 1970's. Budget authority for expanding low income housing assistance stood at \$26.6 billion in 1980, \$8.6 billion in 1983 and just \$0.5 billion in 1984. Low Income Housing Information Service, *Special Memorandum No. 18*, at 2 (1983). One consequence has been an annual net loss in low income housing units, estimated at 500,000. *Displacement, supra*, at 3.

2. Unemployment

During the past two years, and until very recently, unemployment in the United States has been approximately ten per cent, a post-Depression high.¹⁰ N.Y. Times, Sept. 23, 1983, at B10, col. 3. Rises in homelessness are directly related to rates of unemployment. Early in the Depression, demand for shelter

¹⁰ An average of 9.7% of all civilian workers were unemployed in 1982 and over 10% were unemployed in each of the first five months of 1983. U.S. Department of Labor, *Current Labor Statistics*, 106 Monthly Labor Review 49, 55 (July 1983).

in New York City could be directly correlated to unemployment in the manufacturing industry, allowing for a one month lag between the two trends. N. Anderson, *Report on the Municipal Lodging House in New York City* xiv (1932). Fifty years later, another survey of homeless men in a New York shelter found that "loss of a job" was the most common explanation given by shelter residents for their homelessness. N.Y.C. Human Resources Administration, *Study of Long-Term Keener Clients* (May 1982), reprinted in *Congressional Hearing, supra*, at 194, 195.

Recently, unemployment has meant a more rapid descent into poverty than the unemployed experienced in previous recessions, due to both the greater length of the most recent recession and decreases in unemployment compensation.¹¹ Loss of a job in the early 1980's has exposed the unemployed worker, and his family, to a greater risk of homelessness than victims of earlier recessions. As unemployment has risen, the homeless population has become more diverse, including increasing numbers of skilled and educated people, and large numbers of young people.¹²

Recent reductions in unemployment rates have not resulted in a decrease in the number of the homeless. *The Homeless and*

11 "The contrast with experience in the 1974-76 recession is especially striking. In fiscal year 1976 about three quarters of the unemployed were covered by unemployment compensation. In fiscal 1982 only 42 per cent were covered by compensation." *The Poverty Rate Increase: Hearing Before the Subcomm. on Public Assistance and Unemployment Compensation of the House Comm. on Ways and Means*, 98th Cong., 1st Sess. 1 (Oct. 18, 1983) (statement of Gary Burtless, Brookings Institution). In fiscal year 1976, about \$31 billion (1982 dollars) were spent on unemployment insurance for 7.6 million unemployed. In 1982, \$24 billion was spent on unemployment insurance for 10 million unemployed. N.Y. Times, Sept. 9, 1983, at D17, col. 1.

12 See, e.g., N. Kaufman & J. Harris, *Profile of the Homeless in Massachusetts* 2 (1983): "There is a new population of homeless—people who have been working all their lives. . . ."; Andersen, *Left Out in the Cold*, Time, Dec. 19, 1983, at 14: "A great many are illiterate, but surveys in New York City and San Francisco found about the same proportion of college graduates as in the general population." See also, Boston Globe, Nov. 24, 1983, at 2, col. 5, reporting that Boston's Emergency Shelter Commission counted 2,800 homeless individuals on the streets in one night, including 35 boys and 12 girls under the age of 17.

the Economic Recovery, supra, at 1. High chronic unemployment continues in areas where homelessness is particularly prevalent, such as inner city areas.¹³ According to the director of the Congressional Budget Office, the nation's poverty rate is likely to remain high for several years, despite the economic recovery currently under way. N.Y. Times, Oct. 19, 1983, at A22, col. 1. A recent nine-city survey of soup kitchens and emergency shelters found no evidence that the nation's economic recovery was being felt on the streets. *The Homeless and the Economic Recovery, supra*, at 1.

3. Reductions in Aid Programs

Cut-backs in assistance programs on both state¹⁴ and Federal levels have contributed to homelessness in many ways. Reductions in food stamps have forced families to choose between purchasing food and paying rent. Reductions in health care programs and day care programs have forced reallocations in the already sorely strapped budgets of the poor. *Homelessness in America, supra*, at 25-26. In addition, in the past two years the Social Security Administration has intensified its review of persons receiving disability benefits. Fessler, *Senators Press*

13 Nationally, 48.9% of Black men aged 16-19 were unemployed in 1982 and 43.9% in October 1983. U.S. Department of Labor, *Current Labor Statistics*, 106 Monthly Labor Review 68 (December 1983).

14 Cut-backs of benefits on a state-by-state basis are too complex to describe here, but the case of Pennsylvania demonstrates a clear link between diminished public assistance programs and homelessness. A 1982 revision of the Pennsylvania welfare code classified able-bodied men and women between the ages of 18 and 45 as "transitionally needy," and provided, with certain exceptions, that they were eligible for only 3 months of assistance in any calendar year. More than 68,000 people were removed from the state's rolls before a Federal district court declared the practice unconstitutional and ordered it halted. On appeal, that decision was reversed by the Third Circuit, *Price v. Cohen*, 715 F.2d 87 (3d Cir. 1983), which noted, however:

"The plight of the two plaintiffs who are pregnant is especially poignant At a time when her health and nourishment are of exceptional importance to her child's development, a pregnant woman is denied assistance. In the case of one plaintiff, there was a possibility that she would be forced out on the street for the entire last trimester of her pregnancy. . . . We must assume that the legislature and Governor were aware of these potential consequences." *Id.* at 91.

Action to Ease Disability Review Procedures, 40 Cong. Q. Weekly Rep. 2242 (1982). By June 1983, more than 350,000 people had been taken off the rolls since the stepped-up reviews began. N.Y. Times, June 8, 1983, at A17, col. 1.¹⁵

Even before recent reductions in aid for the poor, families dependent on public assistance were severely affected by inflation.¹⁶ The result of these factors has been to lower the resources available to the poor with which to pay for housing. According to the Urban Institute, while average earnings per family will have declined by four per cent across the nation during the period from 1979 through 1984, average welfare and food stamp benefits have declined by 14 per cent. F. Levy & R. Michel, *The Way We'll Be in 1984: Recent Changes in the Level and Distribution of Disposable Income* 4 (1983).

4. Deinstitutionalization

Experts estimate that anywhere between 20 per cent and 50 per cent of homeless single adults are victims of a significant mental disability. Baxter & Hopper, *Troubled on the Streets: The Mentally Disabled Homeless Poor* 5-6, in *The Chronic Mental Patient: Five Years Later* (J. Talbott ed.) (forthcoming). In the mid-1950's, about 650,000 people were hospitalized in psychiatric hospitals in the United States; currently, about 150,000 people are hospitalized. Leepson, *The Homeless: A Growing National Problem*, 11 Editorial Research Reports 796 (1982). The reasons so few persons are hospitalized today are many, ranging from the development of psychiatric drugs which can control certain types of mental disorders, to cost-

15 Evidence compiled by the Mental Health Law Project "indicates that most often the loss of benefits is due to a severely checked ability on the part of the recipient to challenge the ruling—and not to a legitimate winnowing from relief rolls those who have recovered. Equally noteworthy, mental disability is over-represented in successful review cases ([i.e.] those that are discontinued) by a factor of three: roughly 11% of all disability checks go to the mentally disabled, but nearly a third of the discontinued cases are psychiatrically impaired." *Report to the National Governors' Association*, *supra*, at 47.

16 See K. Stallard, B. Ehrenreich & H. Sklar, *Poverty in the American Dream* 31 (1983).

conscious state governments responding to the fiscal impact of high in-patient populations, to the widely accepted professional belief that the mentally ill could be better cared for in community facilities rather than in remote asylums. See generally Pepper & Ryglewicz, *Testimony for the Neglected: The Mentally Ill in the Post-Deinstitutionalized Age*, 52 Amer. J. Orthopsychiat. 388 (1982) (hereinafter cited as *Testimony for the Neglected*).¹⁷ The failure of government properly to implement deinstitutionalization is well documented: "[i]n the simplest terms, the patients from our state hospitals have been discharged into the community, but the dollars to support their care have not followed." *Testimony for the Neglected, supra*, at 389. Aggravating the problems caused by deinstitutionalization are current policies of restrictive admissions. *Id.* As a result, many severely disturbed mental patients are left to sleep in the streets.

D. Consequences: Survival and Death

The effects of homelessness are not difficult to fathom. Insecurity and persistent vigilance take their toll:

"Whether the night is spent at a shelter, on the grates, or in an abandoned building, sleep is invariably fitful or brief or both. Exhaustion becomes the day's constant companion To remain awake, hour after hour, when the body and mind are crying out for rest, is sheer torture." *Homelessness in America, supra*, at 111; see also *Private Lives/Public Spaces, supra*, at 48.

While it may be difficult to determine whether physical and mental disabilities are antecedents to, or consequences of, life on the streets, *Report to the National Governors' Association, supra*, at 42, the damage is palpable and often severe. Com-

17 In most of the United States, deinstitutionalization of mental health patients began in the late 1960's. By 1973, its implementation was described in a leading professional journal as "a national disgrace." Reich, *Care of the Chronically Mentally Ill: A National Disgrace*, 130 Am. J. Psychiatry 911 (1973); six years later the current president-elect of the American Psychiatric Association described it as "still a national disgrace." Talbott, *Care of the Chronically Mentally Ill: Still a National Disgrace*, 136 Am. J. Psychiatry 688 (1979).

mon physical ailments include circulatory difficulties leading to ulceration, chronic undernourishment, infections which refuse to heal, lice infestation, diabetes and hypothermia. R. Lander, *Health Needs of the Homeless* 4 (1983). Moreover, "previous or newly acquired instabilities are exacerbated, at times irreversibly." Baxter & Hopper, *The New Mendicancy*, 52 *Amer. J. Orthopsychiat.* 393, 406 (1982). Disorder or disorientation not only isolates the homeless sufferer from others who share his or her plight, it also may make such individuals extremely wary of offers of assistance and difficult to treat. *Private Lives/Public Spaces*, *supra*, at 48; Segal & Baumohl, *Engaging the Disengaged: Proposals on Madness and Vagrancy*, 25 *Social Work* 358 (1980).

Even those fortunate enough to procure emergency shelter do not escape unscathed. Networks of former social associates are broken and family ties attenuated (where they exist at all). In a 1934 study of emergency shelters in Illinois, two researchers identified a "shelterization" phenomenon:

"After a period of time [as little, they believed, as a few months], a man becomes less sensitive. . . . He shows a tendency to lose all sense of personal responsibility for getting out of the shelter; to become insensible to the element of time; to lose ambitions, pride, self-respect and confidence; to avoid former friends and to identify himself with the shelter group." Segal & Specht, *A Poorhouse in California, 1983: Oddity or Prelude?*, 28 *Social Work* 319, 322 (1983) (quoting E. Sutherland & H. Locke, *Twenty Thousand Homeless Men* 146 (1936)).

Similar phenomena have been observed today. Segal & Specht, *supra*, at 322.

In the extreme, exposure to the elements may result in death. Street deaths due to hypothermia are numerous. On the morning that Congressional hearings on the homeless were convened in December 1982, the District of Columbia reported the fourth street death of a homeless person in that month. *Wash. Post*, Dec. 15, 1982, at B12, col. 2. Over the 1983 Christmas weekend in New York City, fourteen people perished from the cold; six of them died from exposure in subways, abandoned buildings and on the street. *N.Y. Times*, Dec. 27, 1983, at A1,

col. 1. Recent estimates are that between 25 and 50 people die on the streets of New York City each winter month. M. Begun, *Misconceptions of Homelessness: Statement to the Metropolitan Council, American Jewish Congress* 12 (Mar. 10, 1983). These are routine deaths in large cities with harsh winters.¹⁸ Others are more unusual: in Savannah, for example, two homeless men met their deaths when the garbage container in which each was sleeping was picked up and the trash compacted. Savannah Evening Press, Feb. 1, 1983, at 13, col. 2.

SUMMARY OF ARGUMENT

1. Respondents' proposed act of sleeping outdoors in winter, within the context of their proposed demonstration on the plight of the homeless, is protected expressive conduct within the meaning of the First Amendment. It meets this Court's requirement that for conduct to be "speech" there must be present an "intent to convey a particularized message" and the likelihood that under the circumstances "the message would be understood by those who viewed it." *Spence v. Washington*, 418 U.S. 405, 410-11 (1974).

2. (a) Because respondents' proposed demonstration would take place in public forums of unique political importance, governmental interests in banning sleeping must meet a standard of heightened scrutiny in order to outweigh respondents' First Amendment rights. The reasonableness standard urged by petitioners is improper.

(b) Petitioners have not shown, either factually or in terms of anticipated harm, that any properly defined governmental interest outweighs respondents' right to communicate their lack of shelter by sleeping in highly visible public forums in the nation's capital in winter.

18 The Boston Globe has reported that, in the winter of 1982-83, "37 homeless people froze to death on Boston's streets The Emergency Shelter Commission expects the figures this coming winter to be worse." Boston Globe, Nov. 24, 1983, at 2, col. 5.

ARGUMENT

POINT I

SLEEPING OUTDOORS IN WINTER, WITHIN THE CONTEXT OF RESPONDENTS' PROPOSED DEMONSTRATION, IS PROTECTED EXPRESSIVE CONDUCT UNDER THE FIRST AMENDMENT

The constitutional focus of this case turns, to an unusual degree, on an evaluation of the conduct involved. The government characterizes respondents' proposed sleeping in the context of their demonstration as not expressive, or so minimally expressive as to require significant explanation before its point can be understood. Petitioners' Brief at 13.

That fundamental characterization is incorrect. The act of sleeping in public, in the winter, by homeless people conveys to most an immediate message that needs no sign or advertisement. Those who have passed the homeless asleep on park benches, in telephone booths, in discarded cartons and on grates and doorsteps are aware, without anything more being expressed, of a plight from which most individually recoil. Almost instantly one acknowledges the obviously desperate condition of such people. In such encounters, the homeless are, for the most part, unmistakable, and coming upon them when asleep often conveys their condition more vividly than any words. Sleeping outdoors in winter in a highly public place by respondents, as part of their 24-hour-a-day vigil to portray the plight of homeless Americans, accordingly falls squarely in the mainstream of expressive conduct and constitutes "speech" within the meaning of the First Amendment.

This Court has previously found a range of non-verbal activities to be expressive activities protected by the First Amendment, including demonstrating,¹⁹ marching,²⁰ sit-ins,²¹

19 *Edwards v. South Carolina*, 372 U.S. 229 (1963).

20 *Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969); *Gregory v. City of Chicago*, 394 U.S. 111 (1969).

21 *Brown v. Louisiana*, 383 U.S. 131 (1966).

leafletting,²² picketing,²³ displaying a flag,²⁴ wearing arm-bands,²⁵ and affixing a peace symbol to an American flag.²⁶ In those cases, a message was conveyed almost instantaneously because of the people involved and their particular setting: Blacks at a segregated lunch counter, students opposed to a questionable war. Words were not essential to the message.

The present case is no different. Respondents dispute both petitioners' assertion that sleep is not expressive and petitioners' attempt to trivialize sleep as a means of expression in the context of respondents' demonstration. Lack of a safe place to sleep is the very crux of the plight of the homeless. Conducting a peaceful demonstration in winter, which includes the act of sleeping outdoors in the cold, is an appropriate and effective way to communicate the scope and gravity of the homeless' need for shelter and of the helplessness most people feel about how to correct it. Respondents stated in their application for a park permit that the purpose of their proposed activity was "[t]o make visible and concrete the magnitude and the seriousness and the reality of homelessness," Joint Appendix at 9. The Court of Appeals majority found that:

" . . . as applied to CCNV's proposed demonstration, the government's ban will clearly affect expression: there can be no doubt that the sleeping proposed by CCNV is carefully designed to, and in fact will, express the demonstrators' message that homeless persons have nowhere else to go." 703 F.2d at 592.

In its decisions evaluating expressive conduct, this Court has weighed two essential elements before concluding that any particular kind of conduct, including passive conduct, constitutes "speech". Those elements are, first, the context in which

22 *Schneider v. State*, 308 U.S. 147 (1939).

23 *Thornhill v. Alabama*, 310 U.S. 88 (1940).

24 *Stromberg v. California*, 283 U.S. 359 (1931).

25 *Tinker v. Des Moines School District*, 393 U.S. 503 (1969).

26 *Spence v. Washington*, 418 U.S. 405 (1974).

the conduct takes place and, second, whether the conduct readily conveys a particularized message, *Spence v. Washington*, 418 U.S. 405, 410-11 (1974). The conduct contemplated by respondents satisfies this Court's standards on both points, as enunciated in numerous decisions.

In *Garner v. Louisiana*, 368 U.S. 157 (1961), the defendant demonstrators sought to portray their exclusion from lunch counters in the South where only whites were served. The Court found the convictions for violating a Louisiana disturbing the peace statute to be so devoid of evidentiary support as to be unconstitutional. Describing the defendants' activities, the Court stated that they "not only made no speeches, they did not even speak to anyone except to order food; they carried no placards, and did nothing, beyond their mere presence at the lunch counter, to attract attention to themselves or to others." *Id.* at 170.²⁷ As Justice Harlan wrote in his concurring opinion:

"There was more to the conduct of those petitioners than a bare desire to remain at the 'white' lunch counter and their refusal of a police request to move from the counter. We would surely have to be blind not to recognize that petitioners were sitting at these counters, where they knew they would not be served, in order to demonstrate that their race was being segregated in dining facilities in this part of the country.

Such a demonstration, in the circumstances of these two cases, is as much a part of the 'free trade in ideas,' *Abrams v. United States*, 250 U.S. 616, 630 (Holmes, J., dissenting), as is verbal expression, more commonly thought of as 'speech.' " *Id.* at 201.

In *Brown v. Louisiana*, 383 U.S. 131 (1966), the Court reversed the convictions of five Blacks who had refused to leave the reading room of a racially segregated public library

²⁷ While the Court's reasoning in *Garner* was on due process grounds, the case has been considered an important decision on expressive conduct and has frequently been cited in the context of the First Amendment. See, e.g., *Brown v. Louisiana*, 383 U.S. 131, 141-42 (1966).

and had been convicted under a breach of the peace statute. The Court stated:

"We are here dealing with an aspect of a basic constitutional right—the right under the First and Fourteenth Amendments guaranteeing freedom of speech and of assembly, and freedom to petition the Government for a redress of grievances. . . . As this Court has repeatedly stated, these rights are not confined to verbal expression. They embrace appropriate types of action which certainly include the right in a peaceable and orderly manner *to protest by silent and reproachful presence*, in a place where the protestant has every right to be, the unconstitutional segregation of public facilities." *Id.* at 141-42 (emphasis added; footnotes omitted).²⁸

In *Edwards v. South Carolina*, 372 U.S. 229 (1963), the Court overturned the convictions for breach of the peace of 187 Black high school and college students who had assembled near the South Carolina state capitol to protest racial discrimination by carrying signs and walking in an area of the State House grounds open to the public. Finding that the "circumstances in this case reflect an exercise of these basic constitutional rights in their most pristine and classic form," the Court held that in convicting the petitioners, South Carolina had infringed their "constitutionally protected rights of free speech, free assembly, and freedom to petition for redress of their grievances." *Id.* at 235.

In *Tinker v. Des Moines School District*, 393 U.S. 503 (1969), the Court found that the wearing of black armbands in

28 Petitioners suggest that the sit-in cases are irrelevant to the issue before the Court because they involved "civil disobedience." Petitioners' Brief at 22, n.16. Such an assertion begs the question. First Amendment protections bear equally whether litigants seek to have criminal sanctions, such as arrest for breach of the peace, found unconstitutional or whether they seek in advance to void a prior restraint imposed by governmental regulation. Nor can petitioners mean to suggest that respondents' proposed sleeping is inexpressive, or non-speech, because respondents have not violated the law, but that it would be speech, and protected speech, if respondents engaged in "civil disobedience" by violating the Park Service's regulation.

a school environment was "closely akin to 'pure speech' which, we have repeatedly held, is entitled to comprehensive protection under the First Amendment." *Id.* at 505-06. Wearing black armbands, as the Court later stated in *Spence v. Washington*, 418 U.S. 405, 410 (1974), "conveyed an unmistakable message about a contemporary issue of intense public concern—the Vietnam hostilities." Regarding the "silent symbol" of black armbands, the Court found "[i]n the circumstances of the present case, the prohibition of the silent, passive 'witness of the armbands,' as one of the children called it, is no less offensive to the Constitution's guarantees." 393 U.S. at 510, 514.

In *Spence*, the Court found that defendant's use of a peace symbol on an American flag, "combined with the factual context and environment in which it was undertaken, lead[s] to the conclusion that he engaged in a form of protected expression." 418 U.S. at 410. The Court noted that it had "for decades . . . recognized the communicative connotations of the use of flags," and pointed out that "appellant communicated through the use of symbols. The symbolism included not only the flag but also the superimposed peace symbol." *Id.* The Court also found that the defendant's activity of displaying a flag with a peace symbol affixed was "roughly simultaneous with and concededly triggered by the Cambodian incursion and the Kent State tragedy, also issues of great public moment." *Id.*

The protected conduct in the foregoing cases is directly analogous to this case. Respondents' application to be permitted to sleep as part of their demonstration fully complies with the requirements of intent to convey a particularized message and likelihood that under the circumstances the message would be quickly understood by those who viewed it. As Judge Edwards, in his concurring opinion in the Court of Appeals, stated:

"A nocturnal presence at Lafayette Park or on the Mall, while the rest of us are comfortably couched at home, is part of the message to be conveyed. These destitute men and women can express with their bodies the poignancy of their plight. They can physically demonstrate the neglect from which they suffer with an articulateness even Dickens could not match." 703 F.2d at 601.

Respondents' attempt to engage in a form of protected expression is intended to communicate the message that a large number of people are forced to survive in this country without shelter and that the isolated encounters most people have with the homeless are symptoms of a major social and political failing in our democracy. As with the black armbands in *Tinker* and the peace symbol in *Spence*, respondents seek to make a visual rather than oral impression or statement, through sleeping in highly public places. Their willingness to experience great discomfort and to sleep out in the cold, rain and snow shows for all to see the depth of their commitment and the seriousness of the predicament of the homeless.²⁹

The passive physical activity in the sit-in and similar cases does not differ in principle from that involved here. Everybody sits and walks, just as everybody sleeps, and all three activities are engaged in primarily for non-expressive purposes. Nonetheless, walking can be done as part of a march or demonstration, and sitting can be part of a sit-in. This Court has found those uses of an individual's body to be protected expressive activities.³⁰ Petitioners' claim that the Park Service would be

29 Petitioners are not being entirely straightforward in their attempt to trivialize sleep as speech. They are in the contradictory position of arguing, first, that sleep is a very passive activity and not expressive, and, second, that the government's interest in preventing sleep is great. Petitioner's Brief at 13-14, 35-38.

30 See cases discussed at 19-21, *supra*. *Morton v. Quaker Action Group*, 402 U.S. 926 (1971), is not to the contrary. There, the District of Columbia Circuit lifted the district court's nighttime curfew on an anti-war demonstration and permitted a section of the Mall to be used by the demonstrators to sleep in sleeping bags as part of their demonstration. *A Quaker Action Group v. Morton*, No. 71-1276 (D.C. Cir. Apr. 19, 1971), *vacated mem.*, 402 U.S. 926 (1971). This Court vacated the Court of Appeals summary reversal by a decree without opinion, *Morton v. Quaker Action Group*, 402 U.S. 926 (1971). As the decision was issued without opinion, its effect is governed by this Court's holding that summary disposition extends "only to 'the precise issues presented and necessarily decided by those actions.'" *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 499 (1981), (quoting *Mandel v. Bradley*, 432 U.S. 173, 176 (1977) (*per curiam*)). Since this Court's decision in *Morton v. Quaker Action Group*, the Park Service has, on at least two occasions, permitted demonstrators to sleep overnight in the parks at issue here. See 703 F.2d at 588-89; see also Record Document 5.

required to engage in content-based discrimination is incorrect. The Service need do no more than look to whether the purpose of sleeping as stated in the application form is made in good faith.³¹

The entire problem that petitioners advance regarding distinguishing between expressive and non-expressive sleep arises precisely *because* there are homeless people in America. If the homeless had shelter, petitioners could not allege that respondents want to sleep for non-expressive purposes, just as (since people can walk freely in this country) demonstrators cannot be said to walk in a demonstration for non-expressive purposes. It would be a sad paradox to deny the homeless the right to sleep for expressive reasons in a demonstration simply because there are homeless people in America who could conceivably sleep in such a demonstration solely for non-expressive purposes.

POINT II

THE NEW NATIONAL PARK SERVICE "ANTI-CAMPING" REGULATIONS ARE UNCONSTITUTIONAL AS APPLIED TO RESPONDENTS' PROPOSED SLEEPING

A. An Absolute Ban on an Expressive Activity in a Public Forum Traditionally Associated with a Broad Range of First Amendment Activities Is Justified Only If It Is Necessary to a Significant Government Interest.

Because respondents' proposed demonstration would take place in public forums of unique political importance, governmental interests in banning sleeping must meet a standard of

31 The very regulations which prohibit "camping," in fact, provide that "temporary structures . . . may be erected for the purpose of *symbolizing a message* or meeting logistical needs. . . ." 36 C.F.R. § 50.19(e)(8)(1983) (emphasis added). As Judge Mikva noted below, the Park Service has already placed itself in the position of "evaluating requests for temporary structures 'for the purpose of symbolizing a message.'" 703 F.2d at 598 n.31 (quoting 36 C.F.R. § 50.19(e)(8)(1982)). In fact, the Park Service official who wrote one of the respondents to inform him that respondents' application for a permit had been granted in part, but that sleeping would not be allowed, stated in his letter that "[t]he erection of a *symbolic city* to emphasize the plight of the poor and homeless is hereby permitted." (emphasis added). Joint Appendix at 16-17.

heightened scrutiny in order to outweigh respondents' First Amendment rights. Petitioners, however, seek to prevent respondents' expressive sleeping without demonstrating the justification traditionally required for constitutional restrictions on protected speech. They contend that the Park Service regulations need only be reasonable in order to be constitutional, because the act of sleeping has little intrinsic speech value. Petitioners' Brief at 26.

The reasonableness standard urged by petitioners is one which this Court has applied only in the context of public property which, *unlike* Lafayette Park and the Mall, is not by tradition or designation a forum for public communication. See *Perry Education Association v. Perry Local Educators' Association*, ___ U.S. ___, 103 S.Ct. 948 (1983). However, as the Court explained in *Perry*:

"[i]n places which by long tradition or by government fiat have been devoted to assembly and debate, the rights of the state to limit expressive activity are sharply circumscribed. At one end of the spectrum are streets and parks which 'have immemorially been held in trust for the use of the public, and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.'" *Id.* at 954-55 (quoting *Hague v. CIO*, 307 U.S. 496, 515 (1939)).

Lafayette Park and the Mall are public forums of undeniably historic and symbolic significance. As petitioners admit, "[j]ust because these areas have a special place in the national consciousness and because they have such resonance, they also constitute a fitting and powerful forum for political expression and political protest." Petitioners' Brief at 11. A reasonableness standard is consequently improper for measuring the competing constitutional and governmental interests in the present case. Last term, with respect to other "expressive activities involving 'speech'," *United States v. Grace*, ___ U.S. ___, 103 S.Ct. 1702, 1706 (1983), the Court reaffirmed the importance of reviewing with heightened scrutiny regulations on political speech in such public forums:

"In such places, the government's ability to permissibly restrict expressive conduct is very limited. . . .

[R]estrictions such as an absolute prohibition on a particular type of expression will be upheld only if narrowly drawn to accomplish a compelling government interest." *Id.* at 707.³²

Consistent with *Grace*, this Court has applied a heightened standard of review to forms of symbolic speech involving otherwise regulable activities. As stated in *United States v. O'Brien*, 391 U.S. 367 (1968), where the Court upheld the regulation against destruction of draft cards only after reviewing it with a heightened degree of scrutiny, "[t]o characterize the quality of the governmental interest which must appear, the Court has employed a variety of descriptive terms: compelling; substantial; subordinating; paramount; cogent; strong." 391 U.S. at 376-377 (footnotes omitted).³³

Petitioners themselves refer to the regulations as a "general prohibition," or "bar" on sleeping and interpret its effect as being such that "nobody may sleep over in Lafayette Park or the Mall." Petitioners' Brief at 15 and 11. In light of this absolute prohibition, petitioners must demonstrate a significant governmental purpose which is substantially served by

32 Petitioners argue that the regulation at issue in the present case is, on its face, content-neutral and that only regulations "directed at expression," Petitioners' Brief at 31, are subject to strict scrutiny under the First Amendment such that a "compelling" government interest need be shown. The *Grace* decision holds otherwise. There the compelling interest standard was applied by this Court to a statute which did not regulate content but which imposed a total ban on a particular type of expression within a "public forum."

33 That respondents' proposed sleeping may appear to petitioners to be lacking in speech value or conformity to traditional modes of communication does not rob it of First Amendment protection: "We cannot lose sight of the fact that, in what otherwise might seem a trifling and annoying instance of individual distasteful abuse of a privilege, these fundamental societal values are truly implicated. That is why '[w]holly neutral futilities . . . come under the protection of free speech as fully as do Keats' poems or Donne's sermons,' . . . and why 'so long as the means are peaceful, the communication need not meet standards of acceptability.'" *Cohen v. California*, 403 U.S. 15, 25 (1971) (quoting *Winters v. New York*, 333 U.S. 507, 528 (1948) (Frankfurter, J., dissenting) and *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971)).

prohibiting that expression.³⁴ Under any form of heightened scrutiny the Park Service regulations must fail.

B. Petitioners Have Failed to Demonstrate Any Significant Government Interest Which Will Be Served by Denying Respondents the Right to Engage in Expressive Sleeping at Their Symbolic Campsites.

1. Petitioners Have Demonstrated No Factual Basis for Their Asserted Interest in Prohibiting Respondents from Sleeping.

Petitioners seek to justify the Park Service regulations by asserting a governmental interest in "the preservation of these unique parks so as to fulfill their special and manifold purposes." Petitioners' Brief at 17. That generalized interest is, no doubt, admirable. However, as so defined, that formulation of the government interest obscures the real issues at stake, thereby minimizing the speech right of respondents and prejudging the balancing of interests which the First Amendment requires.³⁵ The true governmental interest must be defined with reference to the actual harms which the Park Service regulations are designed to prevent.

Several possible harms are claimed: (1) the strain on park resources and services because of the number of demonstra-

34 Moreover, when, as here, regulations have been revised specifically to undo a prior court ruling favorable to these same demonstrators and involving the same expressive activities in the same forum, see Petitioners' Brief at 5, n.4, strict scrutiny of the claimed government interest should not be lightly abandoned, regardless of the apparent content-neutrality of the regulation. "[T]he regulation of certain forms of communication for reasons other than their content may discriminate de facto (or even intentionally, though in a way that may not be provable) against certain clusters of messages . . . a more serious threat should be required when there is doubt that the speaker has other effective means of reaching the same audience." J. Ely, *Democracy and Distrust: A Theory of Judicial Review* 111 (1980).

35 As John Hart Ely has indicated, generalizing the level of government interest involved will render the requirement of a "substantial" interest, *United States v. O'Brien*, 391 U.S. at 377, always satisfiable. Ely, *Flag Desecration: A Case Study In the Roles of Categorization and Balancing in First Amendment Analysis*, 88 Harv. L. Rev. 1482, 1486 (1975).

tors, Petitioners' Brief at 16 and 39, and the proposed duration of the demonstration, *id.* at 16; (2) a purported "monopol[y]" on the Memorial-core area parks by respondents, to the exclusion or inconvenience of other potential users, *id.* at 16 and 42; and (3) the detrimental effects of "camping" activities, such as cooking, building fires, storing personal belongings, and digging latrines, to which sleeping, if permitted, may purportedly lead, *id.* at 16.

Respondents, however, have never sought to engage in any such activities. In addition, petitioners fail to show that a ban on sleeping *actually* serves an interest in preventing any of the harms they foresee. The number of demonstrators is already regulable by the park authorities.³⁶ A desire to see fewer than the approved number actually participate in the demonstration is not a legitimate justification for the prohibition on expressive sleeping.³⁷ The durational concerns are covered by other parts of the regulations which provide that, for example, demonstrations in Lafayette Park are permissible for seven days only, unless renewed, 36 C.F.R. § 50.19(e)(5)(i) (1983). In any event, the Park Service has limited discretion for refusing or revoking permits if the proposed "nature or duration" of the demonstration "cannot reasonably be accommodated," 36 C.F.R. § 50.19(d)(3) (1983). Fears of "monopolization" are unfounded, since the regulations take into account competing

36 In fact, the number of demonstrators for whom respondents seek permission to sleep—50 in Lafayette Park—falls far below the limit of 3,000 persons permitted by the regulations to conduct a demonstration in Lafayette Park at any one time. See 36 C.F.R. § 50.19(e)(2) (1983). In addition, respondents seek a permit for 100 to sleep on the Mall, where there is no limit to the number of permitted demonstrators under Park Service regulations.

37 Nor is a concern that the sight of homeless persons sleeping in Lafayette Park may offend passersby a constitutionally acceptable reason to restrict virtually their only form of political expression. "It is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers." *Spence v. Washington*, 418 U.S. at 412 (quoting *Street v. New York*, 394 U.S. 576, 592 (1969)). In order to justify the prohibition of a particular communication, petitioners must demonstrate "more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint." *Tinker v. Des Moines School District*, 393 U.S. at 509.

uses for park resources. See 36 C.F.R. § 50.19(d)(1) and (e)(5) (1983).

Consequently, the *only* possible harm not covered by other provisions of the regulations are those asserted to result from "camping" activities. Yet petitioners have made no factual showing that the demonstration activities for which respondents seek a permit will result in any of the harms outlined above, even though last year's demonstration, which involved sleeping, provided petitioners with the opportunity to establish just such a factual basis, if it existed. In the absence of any factual showing, petitioners rely on speculation and suggestion and show no more than "an undifferentiated fear or apprehension of disturbance [which] is not enough to overcome the right to freedom of expression." *Tinker v. Des Moines School District*, 393 U.S. at 508.³⁸

At most, petitioners seek to prevent respondents from sleeping at their demonstration site assertedly because sleeping *may* lead to camping activities, arguing that "[i]t makes no sense to forbid camping without forbidding its central necessary constituent: sleeping overnight in tents." Petitioners' Brief at 47. Yet several "necessary" elements of camping are already permissible under the regulations, such as an overnight physical presence and the setting up of tents, and many other necessary elements of camping will not be available to respondents even if their request to engage in expressive sleeping is granted. Sleeping may be necessary for camping but, as the Court of Appeals concluded in its earlier decision, it does not follow that sleeping constitutes camping. *Community for Creative Non-Violence v. Watt*, 670 F.2d 1213, 1217 (D.C. Cir. 1982).

Petitioners concede that sleeping is an intrinsically passive, nondisruptive, quiet activity, see Petitioners' Brief at 14, and this Court has always required a greater showing of demonstrated harm in order to justify government restrictions on "a silent, passive expression of opinion, unaccompanied by any disorder or disturbance." *Tinker v. Des Moines School Dis-*

³⁸ Nor have respondents sought a permit to camp, to display "illuminated placards" or to play "recorded messages broadcast on a loudspeaker." Petitioners' Brief at 14. Even if respondents had requested permission to use sound amplification equipment, any potential harms arising therefrom are specifically addressed by existing regulations. See 36 C.F.R. § 50.19(e)(11) (1983).

trict, 393 U.S. at 508. Petitioners' ultimate concern with regard to "camping" is not likely about respondents' proposed sleeping, so much as a concern that respondents' demonstration will be effective if sleep is permitted. See Petitioners' Brief at 39.

2. A Total Ban on Respondents' Proposed Sleeping Is Not Necessary to Petitioners' Asserted Interest.

Even assuming that petitioners had shown a significant government interest to be furthered by the Park Service ban on sleeping, the regulations are not "narrowly tailored" to the government's purpose and are more restrictive of First Amendment rights than is necessary. Petitioners brush aside the cases which require that restrictions on "speech" be "no greater than is essential," *United States v. O'Brien*, 391 U.S. at 377, or "narrowly tailored to serve a significant government interest," *Perry Education Association v. Perry Local Educators' Association*, 103 S.Ct. at 955, by claiming that such tests are "not intended to give the courts the power to decide that a fifteen inch flyswatter must be used rather than a sixteen inch one because it is 'less restrictive.'" Petitioners' Brief at 49 n.41. No such question of measurement or degree is raised by petitioners' total prior restraint here.

Rarely will prior restraint on a form of expression be the least restrictive means of protecting a government interest. "Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity." *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971).³⁹ Where, as here, the restraint will have such a critical effect on the political expression of otherwise "discrete and insular minorities," *United States v. Carolene Products Co.*, 304 U.S. 144, 153 n.4 (1938),⁴⁰ less drastic means of furthering the government interest must be considered. When there is no direct causal connection between the prohibition and the harms to be prevented, insisting on regulations tar-

39 See also *Shuttlesworth v. Birmingham*, 394 U.S. 147 (1969) (holding that a law subjecting the exercise of First Amendment freedoms to the prior restraint of a license, without narrow, objective and definite standards to guide the licensing authority, is unconstitutional).

40 See also Ely, *Democracy and Distrust*, *supra*, at 75-77.

geted at those specific harms provides some safeguard for the affected speech, while at the same time allowing for effective regulatory enforcement. As Judge Edwards demonstrated in his concurring opinion below, this can easily be done. 703 F.2d at 604. Any offending conduct which might occur, such as cooking, building fires, storing personal belongings or digging latrines, could thus be dealt with more effectively through sanctions pursuant to existing regulations or revocation of the permit, rather than through prior restraints on unrelated activities. Nor would insisting that petitioners employ a less drastic means impose problems of enforcement on park authorities. In fact, recognizing and sanctioning the activities which may actually damage park resources should be far easier than enforcement of petitioners' tenuous distinction between feigned and actual sleep.

CONCLUSION

For the reasons stated above, the judgment of the Court below should be affirmed.

February 1, 1984

Respectfully submitted,

OGDEN NORTHROP LEWIS
1 Chase Manhattan Plaza
New York, New York 10005
Tel.: (212) 530-4000

*Attorney for the National Coalition
for the Homeless as Amicus Curiae*

Of Counsel:

ROBERT M. HAYES
National Coalition for the Homeless
105 East 22nd Street
New York, New York 10010
Tel.: (212) 460-8110

ROBERT M. BUSCHMANN
CATHERINE V. CURRY
1 Chase Manhattan Plaza
New York, New York 10005
Tel.: (212) 530-4000

No. 82-1998-CFX
Status: GRANTED

Title: William P. Clark, Secretary of the Interior, et al.
Petitioners
V.
Community for Creative Non-Violence, et al.

Docketed:
June 7, 1983

Court: United States Court of Appeals for
the District of Columbia Circuit

Counsel for petitioner: Solicitor General

Counsel for respondent: Macklin, Laura

Entry	Date	Note	Proceedings and Orders
1	Jun 7 1983	G	Petition for writ of certiorari filed.
2	Mar 16 1983		Application for stay filed.
3	Mar 16 1983		Response filed.
4	Mar 17 1983		Application for stay granted by Burger, C.J.
5	Mar 17 1983		Application referred to conference of March 18, 1983 by Burger, C.J.
6	Mar 21 1983		Granted by Court pending timely filing and disposition of writ of certiorari.
8	Jun 29 1983		Order extending time to file response to petition until July 16, 1983.
9	Jul 8 1983		Brief of respondents in opposition filed.
10	Jul 13 1983		DISTRIBUTED. September 26, 1983
11	Sep 16 1983	X	Reply brief of petitioners filed.
12	Oct 3 1983		Petition GRANTED. *****
13	Oct 13 1983		Record filed.
14	Oct 13 1983		Certified original record & proceedings received.
15	Nov 15 1983	D	Motion of respondents to vacate order staying the mandate of the United States Court of Appeals for the District of Columbia Circuit filed.
16	Nov 16 1983		DISTRIBUTED. Nov. 23, 1983. (ABOVE MOTION).
17	Nov 17 1983		Opposition of Sec. of the Interior, et al. to motion of respondent to vacate order staying the mandate of the United States filed.
19	Nov 18 1983		Order extending time to file brief of petitioner on the merits until December 17, 1983.
20	Nov 28 1983		Motion of respondents to vacate order staying the mandate of the United States DENIED.
21	Dec 5 1983	D	Motion of respondents for leave to file supplemental joint appendix not in compliance with Rule 33 filed.
22	Dec 8 1983		Joint appendix filed.
23	Dec 12 1983		Motion of respondents for leave to file supplemental joint appendix not in DENIED. Justice Blackmun and Justice Stevens would grant this motion.
24	Dec 17 1983		Brief of petitioners Clark, Sec. of Interior, et al. filed.
26	Jan 6 1984		Order extending time to file brief of respondent on the merits until February 1, 1984.
27	Feb 1 1984		Brief of respondents Community for Creative, et al. filed.
28	Feb 1 1984		Brief amicus curiae of National Coalition for the Homeless filed.
29	Feb 14 1984		SET FOR ARGUMENT. Wednesday, March 21, 1984. (1st case)
30	Feb 15 1984		CIRCULATED.
31	Mar 12 1984	X	Reply brief of petitioner United States filed.
32	Mar 21 1984		ARGUED.